

CARGILL, INCORPORATED)	
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Complainant,)	
)	
v.)	Docket No. 42120
)	
BNSF RAILWAY COMPANY)	
)	
Defendant.)	
)	

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Attorneys for Complainant

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**JOINT REBUTTAL VERIFIED STATEMENT OF THOMAS D. CROWLEY AND
ROBERT D. MULHOLLAND**

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CARGILL, INCORPORATED)	
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Complainant,)	
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v.)	Docket No. 42120
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Defendant.)	
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Complainant Cargill, Incorporated (“Cargill”) submits this Rebuttal Statement in support of its Opening Statement (“Opening Statement” or “Op.”) filed with the Surface Transportation Board (“STB” or “Board”) on August 25, 2011 and in response to the Reply Evidence and Argument (“Reply”) filed by Defendant BNSF Railway Company (“BNSF”) on October 24, 2011.

In its Opening Statement, Cargill demonstrated that BNSF was engaged in an unreasonable practice because the revenues it was collecting under the assailed tariff item (“ATI”)¹ on its Agricultural (“Ag”) and its Other Freight (“OF”) traffic between

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2006 and 2010 exceeded BNSF's actual incremental fuel cost increases on this traffic by a combined total of \$560.9 million, thus turning a cost recovery vehicle into an unlawful profit center. Cargill also demonstrated that these unlawful profits were caused by three major design flaws in the ATI: the use of step functions that are too short; the use of the wrong Highway Diesel Fuel ("HDF") strike price; and misapplication of the first step increment.

In its Reply, BNSF admits that it has been collecting fuel surcharge revenues under the ATI on its Ag and OF traffic during the 2006 to 2010 time period that exceeded its incremental fuel cost increases, by an amount that BNSF has decided to designate as Highly Confidential { }. Stated another way, BNSF concedes that it is using its fuel surcharge on its Ag and OF products as a profit center, but claims Cargill's calculation is overstated. BNSF also argues that its profiteering should be legally excused.

Cargill demonstrates in this Rebuttal Statement that its calculation of BNSF's profits is correct, and BNSF's is in error, because Cargill's profit calculations, unlike BNSF's, comply with the Board's directive that the parties calculate "the actual incremental cost of fuel"² on each shipment subject to the ATI:

- Cargill's cost analysis uses actual values, whereas BNSF's cost analysis uses system-average values, for four key traffic and operating ("T & O") inputs:

workpaper") file folders labeled "BNSF 6100-A, Item 3375" and "BNSF 6100-A, Item 3376."

² *Cargill, Inc. v. BNSF Ry.*, STB Docket No. 42120 (STB served Jan. 4, 2011) ("*Cargill*") at 5.

the number of locomotives per train, train trailing weight, car tare weight, and the number of intertrain and intratrain (“I & I”) switches. Cargill’s use of actual values for each of these T & O inputs is clearly superior to BNSF’s approach because it produces far more accurate actual costs. For example, if a shipment moves on a train that has two locomotives, Cargill costs the shipment as being on a train with two locomotives, whereas if the “system average” number of locomotives is three locomotives, BNSF costs the same shipment using three locomotives.

- Cargill’s cost analysis, unlike BNSF’s, does not include fixed locomotive fuel costs or non-locomotive fuel costs. By definition, fixed costs have no place in an analysis of incremental fuel costs, nor do non-locomotive fuel costs since ATI was designed to recover only incremental locomotive fuel cost increases.

- Cargill’s cost analysis, unlike BNSF’s, uses the hedged fuel prices BNSF reports as its actual fuel prices in its submissions to the STB and the Securities & Exchange Commission (“SEC”). Cargill’s approach is the correct one where, as here, the objective is to calculate BNSF’s actual incremental fuel costs.

Cargill also responds to, and refutes, BNSF’s assorted arguments why its profiteering should be excused:

- BNSF argues that Cargill has not met its burden of proof. According to BNSF, Cargill’s showing that BNSF earned huge profits under the ATI due to design flaws in the ATI is not enough. Instead, BNSF contends that Cargill must also show that BNSF subjectively intended to use the ATI as a profit center, or show that BNSF

exercised poor business judgment when it first published the ATI in 2006. BNSF is grasping at straws. The governing legal standard is whether “design elements in the [ATI] allow BNSF to recover substantially in excess of the actual incremental cost of fuel,”³ not whether BNSF “intended” to abuse the ATI, or whether it exercised poor business judgment. Moreover, under BNSF’s test, the Board will be drawn into complex questions concerning a rail carrier’s “intent,” which it need not determine. In any event, the evidence shows that {

}.

- BNSF argues that the Board should enter a world of make-believe, where the Board assumes that BNSF is paying more for fuel than it actually did pay. BNSF claims the Board sanctioned the use of make-believe, phantom fuel prices in its *Fuel Surcharges*⁴ decisions, but if one thing is clear it is this: the Board held in *Fuel Surcharges*, and reaffirmed thereafter in *Dairyland*⁵ and *Cargill*, that carriers cannot use their fuel surcharges as “Profit Center[s].” *Id.* at 5.

- BNSF argues that its massive profiteering should be excused because the profiteering is not “substantial.” BNSF’s profits {
 } are “substantial.”

³ *Cargill* at 5.

⁴ *Rail Fuel Surcharges*, STB Ex Parte No. 661 (“*Fuel Surcharges*”) (STB served Mar. 14, 2006) (“*Fuel Surcharges I*”); (STB served Aug. 3, 2006) (“*Fuel Surcharges II*”); (STB served Jan. 26, 2007) (“*Fuel Surcharges III*”); (STB served Aug. 14, 2007) (“*Fuel Surcharges IV*”).

⁵ *Dairyland Power Coop. v. Union Pac. R.R.*, STB Docket No. 42105 (STB served July 29, 2008) (“*Dairyland*”) at 1.

- BNSF argues that the Board lacks jurisdiction to prescribe reasonable practice relief in the form of separate step functions for the Ag and OF traffic subject to the ATI, but that clearly is not the case. BNSF's Ag traffic is far more fuel efficient than its OF traffic and that efficiency must be captured in a separate step function to avoid having Ag traffic cross-subsidize OF traffic. This result is consistent with the Board's rulings in *Fuel Surcharges* that rail fuel surcharges must bear a reasonable nexus to fuel consumption and not result in cross-subsidies. It is also consistent with {

}⁶

In this Rebuttal Statement, Cargill presents counsel's argument and the joint rebuttal verified statement of Thomas D. Crowley and Robert D. Mulholland ("Crowley/Mulholland Reb. V.S."). Crowley/Mulholland respond to contentions raised by BNSF Reply witnesses John P. Lanigan ("Lanigan"), Paul B. Anderson ("Anderson") and Benton V. Fisher ("Fisher"). Herein, Cargill slightly modifies the relief it requested in its Opening Statement (modifications bolded) to remedy BNSF's unreasonable fuel surcharges in this phase of the case:

- The Board should prescribe corrected step functions of **1:5.13** for ATI Ag traffic and **1:4.70** for OF traffic.

⁶ See Cargill Op. at 35 n.38 (citing D-14158) (included in Cargill's opening workpapers).

- The Board should prescribe an ATI strike price of \$1.298 per HDF gallon and prescribe that the starting point for the application of the first one cent per loaded car-mile fuel surcharge at the midpoint of the first step increment.

- The Board should find that BNSF's unlawful surcharge collections on Cargill's traffic under a reasonably calibrated ATI equaled approximately **\$26.8** million for the time period April 19, 2008 to December 31, 2010.

The change in the requested prescribed step functions occurs because Cargill has reclassified some ATI traffic as Ag traffic. The change in Cargill's calculation of BNSF's liability as applied to Cargill's traffic is due to the application of the changed step functions and Cargill's removal of some exempt traffic it inadvertently included in its opening calculations.

ARGUMENT

I.

CARGILL CORRECTLY CALCULATED THE PROFITS BNSF EARNED UNDER THE ASSAILED TARIFF ITEM

In its Opening Statement, Cargill demonstrated that BNSF had collected surcharge revenues on its Ag traffic that exceeded its actual incremental fuel cost increases on this traffic by \$440.4 million during the time period from 2006 to 2010. Cargill also demonstrated that BNSF collected fuel surcharge revenues on its OF traffic that exceeded its actual incremental fuel costs on this traffic by \$120.5 million during the same five year time period (2006 to 2010). The total profits BNSF earned on both groups

combined (*i.e.*, revenues in excess of incremental fuel cost increases) equaled \$560.9 million.⁷

On Reply, BNSF accepts Cargill's overcharge formula (surcharge revenues minus incremental fuel cost increases), and accepts Cargill's calculation of fuel surcharge revenues for both BNSF's Ag and OF traffic. Fisher Reply V.S. at 10-13. However, BNSF claims that the differential between its fuel surcharge revenues and its incremental fuel cost increases for Ag and OF traffic combined is { }. Fisher Reply V.S. at 35, Crowley/Mulholland Reb. V.S. at 2, Table 7.

BNSF argues that Cargill's calculation of profits is overstated because Crowley/Mulholland committed a number of costing errors; did not include fixed locomotive fuel costs; did not include non-locomotive fuel costs; and used hedged fuel costs. Fisher Reply V.S. at 12-13. None of these criticisms has any merit.

A. Cargill Properly Developed BNSF's Actual Incremental Fuel Costs

1. Overview

For each shipment to the ATI, Crowley/Mulholland developed the fuel cost embedded in the shipment's base rate, the fuel cost in the rate at the time the surcharge was applied, and calculated the incremental fuel cost change, or increase, as the difference between these two fuel cost calculations. For example, where the fuel cost per car embedded in the base rate was \$78.53 per car and the fuel cost at the time of shipment

⁷ In this Rebuttal, Cargill's calculation of the \$560.9 million profit figure remains unchanged but Cargill has revised the Ag profit figure to \$489.54 million and the OF profit figure to \$71.33 million. Crowley/Mulholland Reb. V.S., Ex. 15.

was \$270.36 per car, the incremental fuel cost increase equaled \$191.83 per car. *See* Crowley/Mulholland Opening Verified Statement (“Op. V.S.”), Exhibit No. 4 (Example 1).

Crowley/Mulholland used three principal inputs in developing their incremental fuel costs: traffic data that BNSF produced in discovery; URCS unit cost data; and monthly fuel cost data that BNSF produced in discovery. The detailed steps that Crowley/Mulholland followed to use these inputs to develop fuel costs for each shipment are set forth in their Op. V.S. at 8-15.

On reply, BNSF, through its Witness Fisher, claims that Crowley/Mulholland made several errors in their development of incremental fuel costs: (i) they made legally impermissible “movement specific” cost adjustments; (ii) they misallocated locomotive unit-mile (“LUM”) costs on a gross ton-mile (“GTM”) basis; (iii) they failed to properly cost empty train movements; (iv) their study produces illogical results because heavier trains incur lower fuel costs; (v) they failed to properly account for different train types; and (vi) they failed to properly account for BNSF’s I & I switching costs. Fisher Reply V.S. at 13-27.

Mr. Fisher proceeds to correct these asserted errors and to develop URCS fuel costs he claims are prepared in a manner consistent with governing costing procedures as he interprets them. Mr. Fisher then claims that the use of his corrected URCS costs reduces Crowley/Mulholland’s calculation of \$560.9 million in incremental fuel surcharge overpayments to \$441 million. Fisher Reply V.S. at 27-28.

In their Rebuttal Verified Statement, Crowley/Mulholland demonstrate that their development of incremental fuel costs conforms to governing costing procedures and produces far more accurate actual incremental fuel costs than the costs generated by Mr. Fisher's analysis, principally because Crowley/Mulholland's analysis uses actual car tare weights, trailing train weights, locomotives per train, and actual distance between I & I switches. Crowley/Mulholland Op. V.S. at 8, 10-11. By contrast, for each of the foregoing consequential T & O, Mr. Fisher's analysis unnecessarily defaults to system-average inputs, which, in this case, inflates the resulting incremental fuel cost increases. Fisher Reply V.S. at 27-28. Crowley/Mulholland rebut each of the component parts of Mr. Fisher's critique of their costs, and that detailed rebuttal is summarized below.

2. Cargill Correctly Developed and Utilized All Actual T & O Traffic Inputs in Its Incremental Fuel Cost Analysis, Whereas BNSF Applied a Piecemeal Approach That Produces Inflated Costs

Crowley/Mulholland used actual T & O data that BNSF produced in discovery to develop BNSF's incremental fuel costs. Crowley/Mulholland Op. V.S. at 8, 10-11. This data included for most shipments subject to the ATI, the following actual T & O data:

- (1) Waybill Origin
- (2) Waybill Destination
- (3) Number of Cars Per Shipment
- (4) Net Lading Tons Per Car Per Shipment
- (5) Commodity
- (6)* Tare Tons Per Car Per Shipment
- (7) Shipment Miles
- (8) Shipment Car Owner
- (9) Shipment Car Type
- (10) Shipment Type

- (11)* Number of Shipment I & I switches
- (12)* Number of Trains Per Shipment
- (13)* Number of Locomotives Per Train Per Shipment
- (14)* Trailing Weight Per Train Per Shipment

BNSF argues that Crowley/Mulholland erred in using the actual T&O inputs identified above with an asterisk to develop incremental fuel costs. Fisher Reply V.S. at 49-53. BNSF's Witness Fisher substituted "system average" T & O factors for each of these items and developed his fuel costs using these system-average inputs. *Id.* at 55. Crowley/Mulholland's approach is clearly superior to Mr. Fisher's approach because it conforms to the Board's directive in this case to calculate "the actual incremental cost of fuel"⁸ for traffic subject the ATI and, as a consequence, produces more accurate cost results. Crowley/Mulholland Reb. V.S. at 9-26.

For example, assume that a shipment subject to the fuel surcharge moves on a train with three locomotives, a trailing weight of 10,000 tons, and I & I switches that occur every 600 miles. Further assume that the corresponding system average figures are 3.5 locomotives per train, a train trailing weight of 6,000 tons, and I & I switches that occur every 200 miles. Finally, assume that the same unit costs are applied to develop the fuel costs per car.

The Crowley/Mulholland cost approach uses the actual train statistics – 3 locomotives, 10,000 ton trailing weight, and 600 mile intervals between I & I switches – whereas the Fisher approach uses the "system average" inputs – 3.5 locomotives, 6,000 ton trailing weight, and 200 mile intervals between I & I switches. Obviously, the

⁸ *Cargill* at 5.

Crowley/Mulholland analysis will produce a far more accurate incremental fuel cost for this shipment since they are using actual train data, not data for a mythical “system average” train.

3. Cargill’s Use of Actual Costs Is Consistent with Board Precedent

The Board directed that the parties’ costing analyses develop “the actual incremental cost of fuel [BNSF] incurred in providing the rail services” subject to the ATI. *Cargill* at 5. The Board, and the ICC before it, has consistently recognized that use of actual cost data in a costing analysis produces more accurate cost results than the use of corresponding system-average cost inputs. *See, e.g., STB Railroad Cost Program Manual* at 19 (use of actual T & O inputs in costing analysis will produce “a more precise cost estimate of the movement” than use of corresponding “average values”); *W. Tex. Utils. v. Burlington N. & Santa Fe Ry.*, 1 S.T.B. 638, 721 (1996) (“actual costs are always preferable to system average costs”); *Arkansas Power & Light Co. v. Burlington N. R.R.*, ICC Docket No. 36719, 1987 WL 98428, at *26 (ICC served May 7, 1987) (“The Commission has, in numerous cases, consistently held that actual cost is preferable to system average cost.”); *Cost Standards for R.R. Rates*, 364 I.C.C. 898, 903 (1981) (“Actual costs are always better evidence than average costs and should always be used where available.”).

These Board rulings reflect common sense. The cost of fuel associated with transporting any shipment is directly correlated with the actual number of locomotives on a train, the actual train trailing weight, and the actual number of shipment

switching events. While system average T & O inputs can be substituted for these actual inputs, the use of actual T & O inputs provides the more accurate results since it captures the actual train data.

The Board has carved out special costing rules to apply in the development of movement variable costs in maximum reasonable rate cases, and BNSF argues that these special costing rules apply in this case. See BNSF Reply at 50-53 and Fisher Reply V.S. at 13-14, both citing *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (STB served Oct. 30, 2006) (“*Major Issues*”). These special rules do not apply in this case, nor should they.

In *Major Issues*, the Board addressed the question of how variable costs should be calculated in making jurisdictional threshold determinations in maximum rate cases. The Board concluded that these costs should be calculated using the Board’s Phase III movement costing program, nine specific T & O inputs, and without any additional “movement specific” adjustments. The Board explained that it reached this result for seven reasons:

First, the analysis of proposals for movement-specific adjustments is complex, expensive, and time consuming. Second, the Board believed that Congress intended, in adopting the 180% R/VC limitation on rate review, to create an administratively quick and easy-to-determine regulatory safe harbor for railroads. Third, the URCS program already tailors the variable cost calculation to the movement at issue. Fourth, disallowing movement-specific variable cost adjustments would eliminate substantial uncertainty in the current rail rate adjudication process. Fifth, the railroads do not consistently keep certain types of information that shippers have relied on for favorable movement-specific adjustments. Sixth, adjustments to URCS may not provide

more reliable results than using the system-average expenses. Finally, piecemeal or incomplete adjustments to URCS are suspect.

Id. at 48; accord *Entergy Ark., Inc. v. Union Pac. R.R.*, STB Docket No. 42104 (STB served Mar. 15, 2011) at 12 n.37 (holding that the special costing rules apply in determining variable movement costs in through route cases).

This case is not a maximum rate case, or a through route case, nor does it involve calculation of movement variable costs. Instead, the Board required the parties to calculate the “actual incremental cost of fuel.” *Cargill* at 5. The calculation of “actual incremental cost of fuel” is not the same as the calculation of movement variable costs.

Moreover, the reasons given by the Board for limiting the use of movement-specific adjustments in maximum rate cases support the use of the actual T & O data that BNSF says Cargill cannot use to develop actual incremental fuel costs in this case: actual car tare weights, actual locomotives per train, actual train trailing weights, and actual frequency of I & I switches.

First, in this case, “analysis of proposals” to use actual cost inputs is not “complex, expensive, and time consuming.” *Major Issues* at 48. Cargill has developed some very basic, easy to apply actual T & O inputs. These are a far cry from the detailed movement-specific adjustments that were of concern to the Board in maximum rate cases, *e.g.*, development of movement-specific costs for road property, maintenance of way, locomotive maintenance, and other complex movement-specific cost adjustments.

Second, the Board wanted to develop a quick variable cost computation in *Major Issues* that was consistent with Congressional intent that the jurisdictional

threshold be determined “quick[ly]” since it served as a gate-keeper for access to the Board. *Id.* Moreover, once the gate was opened, the Board was faced with the daunting task of evaluating complex SAC evidence. Unlike a major rate case, this case raises limited issues involving the calculation of only one cost item – incremental fuel costs – and the Board can easily review the disputed actual cost computations. This result also conforms to clear Congressional intent that the Board make accurate determinations of the actual incremental fuel costs incurred by defendant carriers in unreasonable fuel surcharge practice cases.⁹

Third, in a maximum rate case, a party can easily run an URCS Phase III cost analysis to determine the variable costs for a movement. One simply needs to download the Board’s Phase III program, input the nine traffic factors, and index the results. However, there is no “Phase III” program that “tailors the variable cost calculation” to develop incremental fuel costs needed in this case. *Id.* The Phase III program develops movement costs, but it does not develop incremental fuel costs. Simply stated, a member of the public cannot sit down at their computer, enter a few inputs into a program, and have the program compute actual incremental fuel costs.

⁹ *Hearing on Economics, Service, and Capacity in the Freight Railroad Industry before the S. Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the Comm. on Commerce, Science & Transportation*, 110th Cong. (June 21, 2006) (opening statement of Senator Lott expressing concerns about possible railroad profiteering on fuel surcharges); *Hearing on the Surface Transportation Board and Regulation Related to Railroads before the S. Subcomm. on Surface Transportation and Merchant Marine Infrastructure, Safety, and Security of the Comm. on Commerce, Science and Transportation*, 110th Cong. webcast excerpt (1:43.24) (Oct. 23, 2007) (statement of Senator Rockefeller expressing similar concerns).

Instead, parties must develop their own programs in order to calculate actual incremental fuel costs, which is exactly what both Cargill and BNSF have done in this case. Since parties must go to this expense, there is no reason why the program should not develop the most accurate actual incremental costs possible for each shipment, which is what Cargill has done, and BNSF has not.

Fourth, the Board was concerned about the number of competing movement-specific traffic adjustments sponsored by parties in maximum rate cases. Hard coding the answer through use of Phase III costs, with nine traffic inputs, removed “uncertainty” concerning the calculation of the jurisdictional threshold. *Id.* Similar concerns do not exist in this case because the number of actual T & O cost inputs is limited, and the only issue here is whether the Board should accept a few disputed ones based on traffic data that would need to be produced in all cases of this type.

Fifth, the Board was concerned in *Major Issues* that “railroads do not consistently keep certain types of information that shippers have relied on for favorable movement-specific adjustments.” *Id.* at 48. No similar concerns exist in this case. The disputed actual T & O inputs are based on traffic data that all major railroads keep in the ordinary course of business.

Sixth, the use of actual car tare weights, actual locomotive counts, actual train trailing weights, and actual number of I & I switches in determining shipment fuel costs in this case will “provide more reliable results than using the system-average” costs. *Id.* at 48. BNSF has different fuel surcharges for different types of traffic and Cargill must show that BNSF’s fuel surcharge revenues exceed its incremental fuel cost

increases on BNSF's Ag and OF traffic. To do so, Cargill must calculate incremental fuel costs for trains carrying Ag and OF traffic, not for trains of "system average" traffic.

Seventh, the Board's concerns about "piecemeal" adjustments to URCS are inapposite in this case. The Board's concerns were directed at shippers' use of shipper-favorable adjustments and carriers' use of carrier-favorable adjustments. The Board concluded that such "piecemeal" adjustments typically off-set each other, with the resulting movement variable costs being quite close to those that would have been generated using the Board's Phase III program (with nine traffic inputs). *Id.* at 53.

This case, unlike the rate cases the Board was concerned about in *Major Issues*, does not involve competing "piecemeal" adjustments. Rather, Cargill has developed some indisputably accurate T & O data and BNSF wants to default to corresponding system average T & O data. And, unlike the rate cases, the use of actual costs makes a huge difference here: BNSF's URCS cost calculations are \$120.3 million higher than Cargill's corresponding calculations principally due to BNSF's use of system average car tare weights, locomotive counts, trailing train weights, and I & I switching frequencies.

4. Cargill Correctly Allocated URCS LUM Costs on a LUM Basis

Mr. Fisher claims that Crowley/Mulholland "did not follow the standard URCS costing approach of multiplying the URCS cost per LUM by the locomotive unit-miles assigned to a shipment" and instead "developed URCS variable locomotive fuel costs based only on gross ton-miles and switch engine-minutes." a result he argues

"ignores the manner by which the majority of BNSF's locomotive fuel costs are assigned to shipments in URCS." Fisher Reply V.S. at 17-18.

Mr. Fisher is confused. In order to cost the approximately { } shipments subject to the ATI, Crowley/Mulholland developed a formula that converted LUM unit costs to GTM costs to simplify the calculation process. However, in undertaking this approach, they did not, as Mr. Fisher contends, "develop[] URCS variable locomotive fuel costs based only on gross ton-miles and switch engine minutes." Fisher Reply V.S. at 18. Crowley/Mulholland's procedures calculate variable locomotive fuel costs based on the locomotive unit-miles assigned to the shipment using the algebraic equivalent of multiplying LUM unit costs by the locomotive unit-miles assigned to the shipment. *See* Crowley/Mulholland Reb. V.S. at 11-15 and Ex. 9.

Crowley/Mulholland demonstrate this algebraic equivalency by showing that the formulas they used, and the formula that Mr. Fisher used (and says is the correct URCS approach) are one and the same, and produce the same results if the same inputs are used in making the cost calculations. Their different costing answers arise due to the use of different T & O inputs, not different costing formulas. *See* Crowley/Mulholland Reb. V.S., Exhibit No. 8.

5. Cargill Properly Costed Round-Trip Moves

Mr. Fisher claims that Crowley/Mulholland's cost analysis is flawed because it "overstate[s] the average weight of the trains that are used to handle the round-trip movement." Fisher Reply V.S. at 19. That is not the case. Crowley/Mulholland's cost analysis assumes that the average weight of empty unit trains equals the actual tare

weight of the empty cars. Crowley/Mulholland Op. V.S. at 11. Crowley/Mulholland's cost analysis also assumes that the empty weight of manifest trains equals the weight of the train moving in the loaded direction. Crowley/Mulholland Reb. V.S at 15-17.

Both of these assumptions conform to standard rail costing procedures, and Mr. Fisher himself made the same assumptions in preparing his cost analysis. The difference between the two costing analyses is that Mr. Fisher used system average T & O inputs, not movement specific inputs. *Id.* For example, manifest trains typically contain both loaded and empty cars.¹⁰ If a car subject to the fuel surcharge moved in the loaded direction and the train had an actual trailing weight of 8,000 tons (reflecting the transportation of both loaded and empty cars), Crowley/Mulholland assume that the car moving in the return direction moves on trains having the same weight.

By contrast, Mr. Fisher did not develop actual train trailing weights for manifest trains containing loaded cars. He simply assumed that the cars moved on trains containing system average train trailing weights (which include loaded and empty cars), and then assumed the cars moved on trains having the same system average trailing weight in the empty direction. Fisher Reply V.S. at 19. Thus, both Crowley/Mulholland and Mr. Fisher make the same assumption – manifest trains have the same trailing weight in the loaded and empty directions – but Crowley/Mulholland use the actual loaded train trailing weight and Fisher uses the system average.

¹⁰ See Crowley/Mulholland Reb. V.S. at 16-17 (“For all trains identified as having moved carload shipments included in our study, the weighted average train statistics are as follows: { } loaded cars, { } empty cars. . . .”)

6. Cargill Properly Costed Heavy Train Moves

Mr. Fisher claims that Crowley/Mulholland's costing analysis is flawed because it produces results that assertedly "contradict the logical outcome that heavier shipments incur higher fuel costs." Fisher Reply V.S. at 18. In fact, this result conforms to the realities of modern railroading. For example, BNSF and other carriers are moving toward the use of heavier unit trains whenever possible, with more fuel efficient locomotives powering them, because use of these trains maximizes efficiencies, and reduces overall fuel costs on a unit output basis. *See* Crowley/Mulholland Reb. V.S. at 21.

7. Cargill Properly Addressed Different Train Types

Mr. Fisher claims that Crowley/Mulholland erred by failing to differentiate between way trains and through trains in their costing analysis of single and multiple car moves. Fisher Reply V.S. at 23-24. In support of this claim, he quotes the following passage from the Board's Railroad Cost Program Manual: "The separate treatment of [way and through train] services is necessary because of the substantial difference in both the average number of locomotives and gross trailing tons per train between way and through train service." Fisher Reply V.S. at 24 n.44. This claim is also incorrect.

Crowley/Mulholland did not need to separately identify trains as "way trains" or "through trains" in their costing analysis because for each train transporting single or multiple car shipments subject to the ATI, they calculated the actual number of locomotives on the train and the actual gross trailing tons per train. Crowley/Mulholland Reb. V.S. at 17-18. This contrasts with the system average approach used by Mr. Fisher,

where only actual shipment miles are known, so the number of miles a shipment moves in way or through train service, the number of locomotives that are on each train, and the train trailing weights, must be estimated using mathematical formulas. The Crowley/Mulholland approach is superior to Mr. Fisher's approach because it uses actual train data to develop way and through train costs.

8. Cargill Properly Calculated BNSF's I & I Switching Costs

In their costing analysis, Crowley/Mulholland calculated I & I switching costs based on the number of I & I switching events that occurred in each shipment. Crowley/Mulholland Reb. V.S. at 18-20. For example if a shipment moved 1,000 miles and received three I & I switches, Crowley/Mulholland calculated I & I costs for three switches.

Mr. Fisher claims that Crowley/Mulholland's analysis is wrong because they should have used the system-average switching frequency – one switch per 200 movement miles. Fisher Reply V.S. at 26. Thus, under Mr. Fisher's approach, a shipment moving 1,000 miles that actually experienced three I & I switches would be allocated costs for five I & I switches, even though there in fact were only three such switches. Crowley/Mulholland's approach produces accurate switching costs; Mr. Fisher's approach does not. Crowley/Mulholland Reb. V.S. at 18-20.

9. BNSF's Restatement of Cargill's URCS-Related Incremental Fuel Costs Is Fatally Flawed

Mr. Fisher purports to “correct[]” the errors in Crowley/Mulholland’s cost analysis by developing his own cost analysis. In his analysis, Mr. Fisher asserts that he (i) “first determined the fuel portion of the system-average URCS variable costs assigned to each [shipment subject to the ATI] based on nine standard costing inputs,” (ii) “determined the number of gallons associated with those variable costs,” and (iii) calculated the incremental fuel cost increase as the difference between the cost per gallon at the base price of \$0.73 and the fuel cost per gallon calculated by Crowley/Mulholland at the time the shipment moved. Fisher Reply V.S. at 27.

According to Mr. Fisher, his calculations show an incremental fuel cost increase on Ag and OF shipments subject to the assailed fuel surcharges between the 2006 and 2010 time period of { } which is \$120,354,000 higher than the { } incremental fuel cost increases he attributes to Crowley/Mulholland’s calculations. *Id.* at 28.

The difference between Mr. Fisher’s and Crowley/Mulholland’s calculations is not surprising. Mr. Fisher’s analysis assumes that all trains carrying cars that are subject to the ATI have the same system average characteristics, all locomotives on all trains have the same fuel consumption characteristics, and all movements subject to the ATI conform to these system averages.

In fact, as Crowley/Mulholland demonstrate, the trains moving Ag traffic are more fuel efficient than the system average trains posited by Mr. Fisher.

Crowley/Mulholland Reb. V.S. at 19-20, 37-40. These efficiencies are captured in their analysis that costs each car, and each train, using the best available data, which consists here of actual traffic data for each car, and each train, along with URCS system-average LUM, GTM, and SEM unit costs.

Crowley/Mulholland's results also conform {

} See Counsel's Reb. Ex. at 3-4. These differences are of course due to the fact that shuttle unit train service is more fuel efficient than single or multiple car service. Crowley/ Mulholland's calculations also show that the transportation of carload Ag traffic is more fuel efficient than the transportation of carload OF traffic, a result that reflects the actual fuel costs BNSF incurs in moving each commodity. Crowley/Mulholland Reb. V.S. at 37-40.

In this case, the Board must utilize the costs that calculate BNSF's "actual incremental fuel cost increases" on the Ag and OF traffic subject to the ATI. *Cargill* at 5. Crowley/Mulholland's cost calculations comply with the Board's directives, whereas Mr. Fisher's cost calculations do not, and should be accepted as the best cost evidence of record in this case.

B. Cargill Properly Excluded Fixed Costs from Its Analysis of BNSF's Incremental Fuel Cost Increases

Mr. Fisher claims that Crowley/Mulholland erred by not including fixed fuel costs in their incremental fuel cost study. According to Mr. Fisher, “a fuel-surcharge mechanism is intended to recover all fuel costs, and not just the portion of locomotive fuel costs considered variable by URCS.” Fisher Reply V.S. at 28. Mr. Fisher cites no authority for his definition of a fuel surcharge, and he studiously avoids any reference to governing Board precedent – and with good reason – because this authority clearly holds that a fuel surcharge cannot be used to recover fixed fuel costs.

The Board held in *Fuel Surcharges II* that rail fuel surcharges may recover lawfully only “the *incremental cost* of fuel attributable to the movement involved”:

A carrier should not identify a surcharge as a cost-recovery mechanism for a discrete portion of its costs unless the surcharge is directly tied to and limited to the *incremental* changes in that particular cost for movements to which the surcharge is applied. In other words, railroads should not call a charge a fuel surcharge if it is designed to recover more than the *incremental cost* of fuel attributable to the movement involved.

Fuel Surcharges II at 5 (emphasis added); accord *Dairyland* at 1 (“Railroads should not call a charge a fuel surcharge if it is designed to recover more than the *incremental cost* of fuel attributable to the movement involved.”) (emphasis added and internal quotations omitted); *Cargill* at 5 (carrier engages in an unreasonable practice if it collects fuel surcharges “substantially in excess of the actual *incremental cost* of fuel incurred in providing the rail services”) (emphasis added).

The Board has long held that “incremental costs” are “attributable costs . . . associated with handling particular traffic,” whereas “fixed costs” are “unattributable costs” not associated with handling particular traffic:

In economic terms, railroad costs are divided into attributable costs (the incremental costs associated with handling particular traffic) and unattributable costs (the joint and common costs incurred by a railroad). Attributable costs are subdivided into LRMC [Long Run Marginal Costs] . . . and short run marginal costs (SRMC)

Because the marginal costs associated with handling particular rail traffic are not readily measurable, we rely on the variable costs produced by the URCS formula as proxy for LRMC *The remaining (nonvariable) portions of the rail industry's costs are characterized as fixed costs and are used as a proxy for unattributable costs.*

Rate Guidelines – Non-Coal Proceedings, 1 S.T.B. 1004, 1027 (1996) (emphasis added); *accord Rules to Govern the Assembling & Presenting of Cost Evidence*, 337 I.C.C. 298, 395 (1970) (“By definition constant or fixed costs are not allocable or assignable upon a cost of service basis, nor traceable to particular units of output, for otherwise they would have been, in fact, variable and not constant.”).

Mr. Fisher’s proposal to include fixed fuel cost recovery is simply not permitted under the governing Board definition of the function of a lawful surcharge, nor should it be. BNSF is free to, and does, recover fixed fuel costs in the same fashion it recovers other fixed costs – in base rail rates subject to rate adjustment provisions. *Crowley/Mulholland Reb. V.S.* at 32-33. Fuel surcharges, on the other hand, are limited expressly to recovery of incremental fuel cost increases not subject to fuel-based rate adjustments.

Crowley/Mulholland correctly focused their cost analysis on the actual incremental fuel cost increases BNSF incurred in providing service to the Ag and OF shippers subject to the ATI. Crowley/Mulholland Reb. V.S. at 9-26. Mr. Fisher's proposal to artificially inflate incremental fuel cost recovery by including non-incremental fuel costs must be rejected.

C. Cargill Properly Excluded Non-Locomotive Fuel Costs in Its Analysis of BNSF's Locomotive Fuel Surcharge

Mr. Fisher next argues that Crowley/Mulholland erred in not including the cost of "non-locomotive fuel costs that BNSF incurs each year," in their analysis of BNSF's locomotive fuel surcharge. Fisher Reply V.S. at 31. Mr. Fisher contends that "BNSF is entitled to recover such fuel costs" under the ATI because, in his opinion, "it is appropriate for a rail carrier to seek to recover the incremental costs of non-locomotive fuel as well as the incremental costs of locomotive fuel through a fuel-surcharge mechanism." *Id.* at 31-32.

He then attempts to quantify the non-locomotive fuel costs BNSF incurs as the difference between the total locomotive fuel expenses BNSF reports in its R-1 each year and the total annual fuel expenses (including non-locomotive fuel) BNSF includes in its Quarterly Fuel Surcharge Reports, and develops a cost percentage factor that he applies in his fuel cost calculations. *Id.* at 32. For example, Mr. Fisher calculates that in 2008, BNSF reported \${ } in locomotive fuel costs and \${ } in total fuel costs. *Id.* He also developed a non-locomotive fuel factor of 4% (\${ })). *Id.* at 38.

The Board should reject Mr. Fisher's proposal to include non-locomotive fuel costs for the following reasons:

First, the purpose of a fuel surcharge is to recover incremental fuel cost increases not included in base transportation rates. BNSF claims that its base rates include a locomotive diesel fuel cost of \$0.73 per gallon, and that the purpose of its fuel surcharge is to recover incremental fuel cost increases above the base fuel cost amount included in its base rates.¹¹ However, BNSF makes no effort to quantify the base level of non-locomotive fuel (principally gasoline) included in its base rates, therefore precluding any form of incremental fuel cost analysis for non-locomotive fuel. Crowley/Mulholland Reb. V.S. at 29.

Second, a fuel surcharge must bear a reasonable nexus to fuel consumption. The assailed fuel surcharges involve fuel consumption by locomotives, and BNSF makes no effort to show that the fuel consumption characteristics of "maintenance vehicles" and other non-locomotives bear any nexus whatsoever to locomotive fuel consumption. Fisher Reply V.S. at 31-33.

Third, non-locomotive fuel costs included in base rates are typically subject to rate adjustment mechanisms, such as the AILF. Crowley/Mulholland Reb. V.S. at 32-33. Therefore, there is no need to apply a fuel surcharge to capture non-locomotive fuel costs because increases in these costs can and are subject to other forms of cost recovery.

¹¹ Cargill Op. at 7-8.

Finally, Mr. Fisher's repeated citations to the Board's Quarterly Fuel Surcharge Reports are misplaced. Fisher Reply V.S. at 31. These Reports, which are prescribed by the Board, require carriers to report on a quarterly basis, among other things, a railroad's total fuel costs, which includes both locomotive and non-locomotive fuel costs. However, these Reports do not provide information that is pertinent in an individual fuel surcharge case, nor were they so intended. As the Board said when it adopted these Reports, "[t]he Fuel Surcharge Report is intended to provide an overall picture of the use of fuel surcharges: it is not intended as a substitute for evidence brought in an individual case." *Fuel Surcharges IV* at 5.

D. Cargill Properly Used Actual Fuel Prices in Its Cost Study

Mr. Fisher claims that Crowley/Mulholland erred in using the actual price that BNSF paid for fuel in their cost analysis, as that price was reported to the STB and the SEC, because that price accounts for BNSF's fuel hedging actions. He asserts that the Board should use BNSF's fuel costs calculated without "the impact of hedging" because hedging "is effectively an after-the-fact adjustment of BNSF's actual fuel prices to account for separate hedging activities." Fisher Reply V.S. at 33-34.

Mr. Fisher's definition of "actual fuel prices" is one of his own making, and not one shared by either the STB or the SEC.¹² When BNSF engages in a hedge, it effectively locks in the price for the gallons of diesel fuel subject to the hedge.¹³ That

¹² See Crowley/Mulholland V.S. at 33-35.

¹³ See *Fuel Surcharges*, BNSF Fuel Surcharge Briefing PowerPoint at 4 (March 11, 2006) (BNSF's fuel hedges are "current commitments for future fuel prices"); Jeffrey

price is BNSF's "actual price" and this actual price is the one that BNSF reports in its filings with both the SEC and the STB.¹⁴

Mr. Fisher also complains that it is unfair to judge BNSF's fuel surcharge "based on the inherently unpredictable outcome of hedging." Fisher Reply V.S. at 34. Presumably, BNSF engages in hedging because it believes that the results have some predictability over time – *i.e.*, it will lower BNSF's fuel costs – otherwise the company would not be engaging in hedging activities. In fact, that is exactly what has happened: BNSF's hedging activities have reduced its fuel costs.

The real reason why Mr. Fisher wants to develop and utilize fuel costs calculated without the impact of hedging is that the resulting fuel prices, on average, are higher than BNSF's actual fuel prices. While that may be a good position for him to take on behalf of BNSF, it has no place in an analysis of BNSF's actual incremental fuel cost increases, which is why Crowley/Mulholland used BNSF's actual fuel prices in their incremental fuel cost analysis.

LeMunyon, "Managing Your Money: Controlling Volatile Fuel Costs," *Mass Transit*, Sept.-Oct. 2005 ("hedging is the process of either reducing or eliminating the range of probable energy costs over a future time period. This is done by 'locking in' the price today for future needs.").

¹⁴ See, e.g., BNSF 2010 10-K at 9 (reporting "Total fuel expense . . . [including] gains and losses from fuel derivatives"); BNSF Quarterly Report of Fuel Cost, Consumption, and Surcharge Revenue for the Quarter Ending March 31, 2011 (noting reduction in reported Q1 2011 "to fuel cost due to purchase accounting adjustments for fuel hedges"); Crowley/Mulholland Reb. V.S. at 33-37.

E. Cargill Correctly Found That BNSF Had Earned \$560.9 Million in Unlawful Profits Under the Assailed Fuel Surcharges

Crowley/Mulholland's cost study is clearly superior to Mr. Fisher's because their study: (1) correctly calculates incremental fuel cost increases on BNSF's Ag and OF traffic; (2) correctly excludes fixed costs; (3) correctly excludes non-locomotive fuel costs; and (4) uses correct actual fuel prices. Their study correctly concludes that BNSF collected \$560.9 million in profits under the assailed fuel surcharges: \$489.54 million on its Ag Traffic and \$79.33 million on its OF traffic.

II.

CARGILL DEMONSTRATED THAT BNSF'S PROFITS ARE BEING COLLECTED DUE TO DESIGN FLAWS IN BNSF'S FUEL SURCHARGE METHODOLOGY

Cargill demonstrated in its Opening Statement that the \$560.9 million in profits that BNSF had earned under the ATI were due to three design errors in the ATI: use of the wrong step functions; use of the wrong HDF starting point; and misapplication of the first incremental step rate.

BNSF spends most of its Reply asking the Board to excuse its design errors for various reasons (discussed in Parts III and IV below) and, aside from challenging Cargill's cost calculations, presents few relevant substantive challenges to Cargill's proof of the design flaws in the ATI.

A. BNSF Uses the Wrong Step Functions

Cargill demonstrated in its Opening Statement that the principal reason why BNSF was collecting fuel surcharge revenues under the ATI that were substantially in

excess of BNSF's actual incremental fuel cost increases was due to BNSF's use of the wrong step functions. The ATI utilizes a 1:4 step function, *i.e.*, there is a one cent increase per loaded car-mile for every four cent increase in HDF. Cargill demonstrated that the correct step functions for its Ag traffic was 1:5.18 and 1:4.57 on its OF traffic. Crowley/Mulholland Op. V.S. at 19. Application of these step functions produces fuel surcharge revenue recoveries during the 2006 to 2010 time period that closely track BNSF's actual incremental fuel cost increases.

Crowley/Mulholland developed these corrected step functions using the results of their cost study and standard regression analyses separately applied to BNSF's Ag and OF traffic, using the following procedure:

First, they determined the Correct Fuel Surcharge each month between 2006 and 2010 by dividing BNSF's actual incremental fuel cost increases for each traffic group by corresponding loaded surcharge miles.

Second, they determined the corresponding HDF price for each month and determined the statistical relationship between HDF price during the shipment month and the corresponding Correct Fuel Surcharge using a regression where the current HDF price for a month was the independent variable and the Correct Fuel Surcharge for the same month was the dependent variable.

Crowley/Mulholland Op. V.S. at 17-20.

Crowley/Mulholland then tested their regression results using standard statistical tests and found that application of these tests produces "reasonable results because the R-squared (reasonableness of fit) statistic equals 90% and both coefficients are statistically significant." Crowley/Mulholland Op. V.S. at 20.

In its Reply filing, BNSF does not argue that the methodology that Cargill used to develop its restated step functions is wrong in any way, but disputes the results because it believes that Cargill used the wrong cost inputs, it believes Cargill's showing is not legally relevant, and it challenges the Board's jurisdiction to prescribe different step functions for Ag and OF traffic. BNSF Reply at 64-66.

As shown in Part I above, Cargill did use the correct cost inputs in the regressions it used to calculate the corrected step functions. As shown in Part III below, BNSF's relevance objections are without merit; and as shown in Part IV below, the Board clearly has the authority to prescribe separate corrected step functions for Ag and OF traffic subject to the ATI.

BNSF also claims that Cargill misclassified some OF traffic as Ag traffic. Cargill has reviewed its classifications and has made some minor changes in traffic classifications from those it made in its Opening Statement. As a result of these changes, the revised corrected step function for Ag is 1:5.13 and the revised corrected step function for OF is 4.70. Crowley/Mulholland Reb. V.S. at 39.

B. BNSF's Step Functions Bear No Reasonable Nexus to BNSF's Actual Fuel Consumption

Cargill also demonstrated in its Opening Statement that its cost study showed that BNSF's 1:4 step function bore no reasonable nexus to BNSF's actual fuel consumption because BNSF's actual fuel consumption was far more efficient on its Ag and OF traffic than the 4 MPG fuel consumption that BNSF stated was implicit in the 1:4 step function:

{

}.
}

Our analysis shows that during the 2006 through 2010 study period, BNSF actually averaged { } MPG for Ag traffic ({ } MPG when surcharge miles are used as the divisor) and { } MPG for other traffic to which the ATI was applied ({ } MPG when surcharge miles are used as the divisor).

Crowley/Mulholland Op. V.S. at 26-27.

In its Reply, BNSF does not dispute that Cargill's cost study produces the actual MPG's cited above, and does not dispute that these figures are substantially higher than 4 MPG. Instead, BNSF argues that Cargill's calculation of actual MPG's is flawed because BNSF disagrees with the inputs Cargill used to make these calculations, and disputes the legal relevance of the showing. Fisher Reply V.S. at 4-8.

Cargill's MPG inputs were drawn from its cost study which, as demonstrated in Part I above, correctly calculates BNSF's incremental fuel costs and, as shown in Part III, BNSF's relevance objections are without merit.

Cargill does change (slightly) its calculation of MPG's to address its reclassification of some AG and OF shipments. The revised average MPG figures for the study time period are: { }(actual for Ag traffic); { } (Ag traffic when surcharge miles are used as the divisor); { } (actual for OF traffic); and {

} (OF traffic when surcharge miles are used as the divisor). Crowley/Mulholland Reb. V.S. at 39-40.

C. The ATI Uses the Wrong Strike Price and Misapplies the First Step Increment Charge

Cargill demonstrated in its Opening Statement that the ATI had two other design flaws: it used the wrong HDF strike price (\$1.25 per gallon) and misapplied the first step increment charge. Cargill demonstrated, using three historic metrics, that the actual HDF price equivalent to BNSF's strike price of \$0.73 per gallon equaled \$1.298 per HDF gallon. Crowley/Mulholland Op. V.S. at 29-31.

Cargill also demonstrated that by applying a fuel surcharge right at the HDF strike price level resulted – by itself – in additional over-recoveries because BNSF “collects fuel surcharges on movements for which BNSF incurs no incremental fuel costs above the costs incorporated in and recovered through its base rates.” *Id.* at 32. This design error is corrected by starting the fuel surcharge at the mid-point of the first step increment. *Id.*¹⁵

In its Reply, BNSF does not argue that there are any errors in Cargill's calculation of the \$1.298 per gallon HDF base price, or that there are any errors in Cargill's critique of how BNSF misapplies its first step rate increment. Crowley/Mulholland Rebuttal V.S. at 41-45. Instead, BNSF claims principally that the

¹⁵ Between 2006 and 2010, BNSF's use of the wrong HDF base price generated { } in profits to BNSF and misapplication of the first step increment produced { } in profits to BNSF.

showings are not legally relevant, a contention that Cargill addresses in Part III below.
BNSF Reply at 24-27.

BNSF also contends that its selection of the \$1.25 HDF strike price in the ATI was based on a regression analysis that BNSF performed in 2004-2005. *See* Anderson Reply V.S. at 15. However, BNSF did not produce the regression. In their Rebuttal V.S., Crowley/Mulholland did perform regressions using fuel price data available to BNSF during the 2004 to 2005 time period. The results confirm that the use of the \$1.25 strike price was incorrect, and further confirm that the proper HDF strike price is \$1.298 per HDF gallon. Crowley/Mulholland Reb. V.S. at 40-44.

III.

BNSF'S COLLECTION OF MASSIVE PROFITS DUE TO DESIGN FLAWS IN THE ASSAILED FUEL SURCHARGE PROGRAMS CONSTITUTES AN UNREASONABLE PRACTICE

BNSF faces a major problem in this case. Cargill's evidence clearly shows that BNSF's fuel surcharge revenues exceeded its incremental fuel cost increases on its Ag and OF traffic by \$560.9 million between 2006 and 2010 due to three critical design flaws: use of the wrong step functions; use of the wrong HDF start price; and misapplication of the first step increment. That's \$560.9 million in profits.

However, it is not just Cargill's evidence that shows substantial profits. BNSF's own evidence – including its vastly bloated cost calculations – shows that BNSF's fuel surcharge revenues exceed its incremental fuel cost increases on its OF and Ag traffic by { } between 2006 and 2010. That's { } in profits.

Rather than simply admitting that it has collected unlawful profits under the ATI – and leaving it to the Board to decide the parties’ dispute over the total amount of those profits – BNSF claims that the law excuses its profit-taking. BNSF devotes the lion’s share of its Reply to its proffered legal excuses, which are:

- *Legal Excuse No. 1.* BNSF cannot be found to have engaged in unreasonable fuel surcharge practices in this case unless Cargill demonstrates that BNSF intentionally designed the ATI as a profit center. Under this theory, BNSF’s actual profit-taking is excused unless malicious intent is shown (“Bad Intent Defense”). *See, e.g.*, BNSF Reply at 18.
- *Legal Excuse No. 2.* BNSF cannot be found to have engaged in unreasonable fuel surcharge practices in this case unless Cargill demonstrates that BNSF’s management acted irrationally based on information it had at the time it made its fuel surcharge decisions. Under this theory, BNSF’s actual profit taking is excused unless it is shown to be the product of bad management decisions (“Bad Management Defense”). *Id.* at 25-26.
- *Legal Excuse No. 3.* BNSF cannot be found to have engaged in unreasonable fuel surcharge practices in this case if the Board assumes BNSF paid more for fuel than it actually did pay. Under this theory, BNSF’s actual profit taking is reduced by the amount that its incremental fuel cost increases are jacked-up by phantom fuel price that are higher than BNSF’s actual fuel prices (“Phantom Fuel Price Defense”). *Id.* at 57-59.
- *Legal Excuse No. 4.* BNSF cannot be found to have engaged in unreasonable fuel surcharge practices in this case if the profit-taking is deemed by BNSF to be *de minimus*. Under this theory, collection of excessive profits with a threshold of at least \$ { } is excused as too small to be unreasonable (“*De Minimis* Profiteering Defense”). *Id.* at 57.

BNSF's attempts to evade liability for its profiteering finds no support in the law and should be summarily rejected by the Board.

A. BNSF's Use of the ATI to Collect Massive Profits as a Result of Flaws in the Design of the ATI Is an Unreasonable Practice

The governing legal standards here are clear. In its Complaint, Cargill alleged that BNSF's "collection of fuel surcharges from Cargill under the [ATI] constitutes an unreasonable practice under 49 U.S.C. § 10702(2) because BNSF is using the Assailed Tariff Item to extract substantial profits over and above its incremental fuel cost increases for the BNSF system traffic to which the surcharge is applied." *Id.* at ¶ 7 ("Profit Center claim").

Cargill modeled its Profit Center claim on the Board's rulings in *Fuel Surcharges*, and *Dairyland*, holding that a rail carrier engages in an unreasonable practice if it uses fuel surcharges to collect revenues substantially in excess of the carrier's actual incremental fuel costs in providing service to the system traffic subject to the fuel surcharge. *See* Cargill's Reply in Opposition to BNSF Railway Company's Motion for Partial Dismissal (filed June 17, 2010) at 13-15.

Nevertheless, BNSF moved to dismiss Cargill's Profit Center claim, arguing that it was not permitted under the Board's rulings in *Fuel Surcharges* and *Dairyland*. *See* BNSF Railway Company's Motion for Partial Dismissal (filed May 28, 2010) at 8. The Board denied BNSF's motion, holding that BNSF would be found to have engaged in an unreasonable practice, as alleged in Cargill's Profit Center claim, if

Cargill's proof demonstrated that BNSF was earning "substantial[]" profits under the ATI due to flawed "design elements" in the ATI:

In *Dairyland*, the Board clarified the types of claims that properly could be brought under *Fuel Surcharges*. . . .

Cargill's Profit Center claim is not inconsistent with our guidance in *Dairyland*. Cargill does not allege that BNSF uses the challenged fuel surcharge to over-recover its fuel costs incurred in handling *Cargill's* traffic. Instead, Cargill claims that BNSF uses this fuel surcharge "to extract substantial profits over and above its incremental fuel costs for the BNSF system traffic to which the surcharge is applied." Complaint at 3 (emphasis added). In other words, Cargill appropriately focuses on how the fuel surcharge operates in the aggregate and not solely on how it operates with respect to Cargill.

Consistent with *Dairyland*, *Cargill may present evidence to demonstrate that design elements in the challenged fuel surcharge allow BNSF to recover substantially in excess of the actual incremental cost of fuel incurred in providing the rail services to the entire traffic group to which the surcharge applies. Accordingly, we will deny BNSF's motion to dismiss Cargill's Profit Center claim.*

Cargill at 5 (emphasis added).

That is exactly the proof that Cargill tenders to the Board. Cargill's proof shows that BNSF is earning "substantial[]" profits under the ATI – \$560.9 million between 2006 and 2010 alone – due to three "design flaws" in the ATI: use of the wrong step functions; use of the wrong HDF strike price; and misapplication of the first step increment.

B. BNSF's Profiteering Is Not Excused Under Its Bad Intent Defense

BNSF repeatedly argues that its profit-taking is excused unless Cargill demonstrates that BNSF managers intentionally designed the ATI as a profit center. *See, e.g.,* BNSF Reply at 18 (“The burden is on the complaining shipper to show that the label of ‘fuel surcharge’ is not truthful because the design of the fuel surcharge in question was intended to generate profits substantially in excess of incremental costs incurred to purchase fuel.”)

Of course, that is not the standard the Board set in its *Cargill* decision in this case. Under the Board’s test, the question is whether design errors in the ATI “allow” BNSF to earn substantial profits. *Id.* at 5. Whether the ATI functions in a manner that “allow[s]” substantial profit taking does not turn on intent, but effect – is the surcharge mechanism “allow[ing]” substantial profits to occur.

BNSF claims that its Bad Intent Defense is rooted in principles of “misrepresentation theory.” BNSF Reply at 21. However, federal regulators have long banned the use of the “I did not intend it defense” in many cases involving deceptive conduct. For example, the defense has been rejected in deceptive practice cases arising under Section 5 of the Federal Trade Commission (“FTC”) Act, an Act that outlaws, *inter alia*, “unfair or deceptive acts or practices in or affecting commerce.”¹⁶ *See FTC v. Sterling Drug, Inc.*, 317 F.2d 669, 674 (2d Cir. 1963) (“proof of intention to deceive is not a requisite to a finding of violation of the statute”). The defense is also not permitted

¹⁶ 15 U.S.C. § 45(a)(1).

under analogous state statutes. *See Curtis Lumber Co., Inc. v. La. Pac. Corp.*, 618 F.3d 762, 779 (8th Cir. 2010) (“the majority of states with [‘little FTC acts’] do not require knowing or intentional deception in order to state an actionable claim under their respective acts”).

More importantly, the Board did not adopt or sanction BNSF’s Bad Intent Defense in *Fuel Surcharges*, as BNSF contends. In that case the Board held that using a fuel surcharge as a profit center “is a misleading and ultimately unreasonable practice”¹⁷ and banned two specific fuel surcharge practices under this standard: percent of price fuel surcharges, and double dipping. In so holding, the Board did not make any findings that the railroads were imposing these charges with a specific intent to over-recover their actual fuel cost increases, and issued the relief over objections by BNSF and other railroads that they had no intent to overcharge.

Instead, the Board ruled that an unreasonable practice occurs when a carrier uses a fuel surcharge mechanism – which by definition is limited to incremental fuel cost recovery¹⁸ – as a profit center. Such actions “misrepresent” fuel surcharges as cost recovery vehicles, when they are not, and such carrier actions “mislead their customers,” regardless of the carrier’s subjective intent:

Congress exempted the rail carriers from the consumer protection requirements of the Federal Trade Commission Act. presumably not because Congress intended to permit carriers to mislead their customers, but because our authority

¹⁷ *Fuel Surcharges III* at 7.

¹⁸ *See id.* at 7 (“the term ‘fuel surcharge’ most naturally suggests a charge to recover increased fuel costs associated with the movement to which it is applied”).

to proscribe unreasonable practices embraces misrepresentations or misleading conduct by the carriers. And the record in this proceeding provides extensive testimony by shippers who have expressed concern about carriers raising their rates on the pretext of recovering increased fuel costs. If the railroads wish to raise their rates they may do so, subject to the rate reasonableness requirement of the statute, but they may not impose those increases on their customers on the basis of a misrepresentation.

Fuel Surcharges III at 7.

The Board's rulings in *Fuel Surcharges* is clear: a carrier engages in an unreasonable practice if it adopts fuel surcharges – which can only be used to recover incremental fuel cost increases – but then uses the surcharges as a profit center. The “misrepresentation” is the disconnect between the purpose of the fuel surcharge – cost recovery – and what the surcharge is actually doing: over-recovering actual incremental fuel cost increases. The result is that the public is deceived. This practice is unreasonable regardless of the charging railroad's subjective intent.

C. BNSF's Profiteering Is Not Excused Under Its Bad Management Defense

Next, BNSF trots out the consistently rejected Bad Management Defense. The gravamen of this defense is that the Board's role in an unreasonable practice case is not to “second guess” a rail carrier's reasonable business judgments. BNSF Reply at 25-26.

BNSF's Bad Management Defense fails for the same reason its Bad Intent Defense fails: it ignores the governing legal standard in this case, *i.e.*, whether “design elements” in the ATI “allow[ed] BNSF to recover substantially in excess of the actual

incremental cost of fuel incurred in providing the rail services.” *Cargill* at 5. The issue whether the design elements were the product of good or bad management practices at the time they were made, or later, is not relevant to the governing legal inquiry.

Similarly, BNSF’s attempts to use its Bad Management Defense to block the Board’s review of Cargill’s design flaw evidence are absurd. Cargill’s evidence demonstrates that BNSF is earning massive profits under the ATI for three reasons: use of the wrong step function; use of the wrong HDF strike price; and use of the wrong first step increment. Incredibly, BNSF argues that any consideration by the Board of each defense constitutes impermissible “second guessing” of BNSF management.

For example, BNSF contends that the Board’s role in reviewing a mileage-based fuel surcharge is limited to whether the carrier has based its surcharge on “*design elements*” such as miles and the HDF index, but does not extend to reviewing design “*values*” such as the length of step increments or the starting HDF strike price, because consideration of such values would constitute impermissible “second-guessing” of BNSF management. BNSF Reply at 25-26 (emphasis added). The asserted distinction between “elements” and “values” is ludicrous. The single most important “design element” in a fuel surcharge mechanism is its step function. The starting step price, along with how the first step increment is applied, are also important design elements. If one or more of these values is wrong, massive overcharges can occur, which is exactly what is happening under the ATI.

Finally, BNSF’s Bad Management Defense asks the Board to determine whether BNSF’s managers made rational decisions based on the information they had at

the time they made them. That standard was rejected long ago. *See Consol. Rail Corp. v. ICC*, 646 F.2d 642, 647-48 (D.C. Cir. 1981) (Board's role in an unreasonable practice case is not whether the practice "can be described as 'rational' from the railroads' perspective, but instead whether the practice . . . is reasonable when viewed from the public perspective of the [Board]"); *accord Pub. Serv. Co. of Colo. v. Burlington N. & Santa Fe Ry.*, STB Docket No. 42057 (STB served Jan. 19, 2005) at 4 (the Board is "the guardian of the general public interest").

The Board recently reaffirmed these principles in the *Coal Dust Case*.¹⁹ In that case, coal shippers contended that BNSF's publication of its coal dust tariff was an unreasonable practice. BNSF argued in that case, as it does here, that the Board had no legal authority to second-guess BNSF's "rational" business judgments.²⁰ The Board rejected that standard, and, after considering all relevant evidence tendered by coal shippers, held that BNSF's tariff publication was an unreasonable practice.²¹

These cases also demonstrate that Cargill is not asking the Board to engage BNSF in some unfair "post hoc" review of its practices, as BNSF contends. BNSF Reply at 68. All proceedings before the Board necessarily involve the use of post-hoc evidence. The issue in this case is whether BNSF is engaging in an unreasonable practice by using a fuel surcharge in an unlawful manner – as a profit center. Cargill's evidence

¹⁹ *Ark. Elec. Coop. Corp. – Pet. for Declaratory Order*, Finance Docket No. 35305 (STB served March 3, 2011) ("*Coal Dust Case*").

²⁰ *Id.*, BNSF Ry. Opening Evidence and Argument at 20 (filed Mar. 16, 2010)

²¹ *Coal Dust Case* at 16.

demonstrates that BNSF is using the ATI as a profit center, as does BNSF's own evidence.

D. Even If Relevant, Which They Are Not, the Facts Do Not Support BNSF's Bad Intent and Bad Management Defenses

For the reasons set forth above, Cargill does not have to show that BNSF managers acted with bad intent, or failed to exercise rational railroad business judgment to prevail in this case. However, as Cargill demonstrated in its Opening Evidence,

{

} Cargill Op. at 28 (citing D-46873 and D-46871),

29 n.23 (citing D-20456).

Cargill's opening evidence also showed that:

{

}

E. BNSF's Profiteering Is Not Excused Under Its Phantom Fuel Price Defense

BNSF's Phantom Fuel Price Defense asks the Board to assume that BNSF's incremental fuel price differentials were greater than BNSF's actual fuel price differentials. BNSF's actual fuel price differentials equaled the difference between the \$0.73 per gallon fuel price BNSF said was embedded in its base rates, and the actual price of fuel BNSF paid during the shipment month. BNSF calculates that between 2006 and 2010, its actual weighted average incremental fuel price equaled {

}.²² See Rebuttal e-workpaper "BNSF Phantom Cost Breakdown.xlsx" at range C73:G73.

BNSF's Phantom Fuel Price Defense ignores this actual price differential, and instead substitutes a phantom weighted average differential of { }. *Id.* at range I73:L73. The phantom differential equals the difference between two fuel prices BNSF did not pay to purchase locomotive fuel: an HDF base price of \$1.25 per gallon and the HDF price in each shipment month between 2006 and 2010.

BNSF proceeds to multiply the phantom { } weighted average HDF price differential, and its calculated { } actual weighted average price differential, by the total number of gallons of fuel BNSF claims it consumed in providing service to ATI shippers between 2006 and 2010.²³ See

²² This calculation improperly includes a hedging adjustment and a non-locomotive fuel mark-up. Crowley/Mulholland Reb. V.S. at 5 n.4.

²³ BNSF's consumption calculation includes fuel volumes it should exclude: non-variable locomotive fuel and non-locomotive fuel. Crowley/Mulholland Reb. V.S. at 5

Crowley/Mulholland Reb. V.S. at 5-6. BNSF then asserts that the resulting dollar differential between the two calculations { } should be included in the calculation of its actual incremental fuel cost increases. Crowley/Mulholland Reb. V.S. at 5-6.

BNSF's Phantom Fuel Price Adjustment inflates BNSF's actual fuel cost increases by adding { } in phantom expenditures BNSF did not make to purchase fuel, and, conveniently for BNSF, the total amount BNSF did not pay (\$ { }) wipes out the differential of { } that BNSF calculated as the difference between its fuel surcharge revenues and its actual incremental fuel costs.

BNSF's Phantom Fuel Price Defense is not permitted for the same reasons that its other bogus Defenses are not permitted – it violates governing legal standards. The governing legal standards call for the parties to measure the difference between BNSF's fuel surcharge revenues and its "actual incremental cost of fuel." *Cargill* at 5. BNSF was not paying incremental HDF prices for fuel, it was paying lower actual incremental fuel prices. Inclusion of fuel prices BNSF was not paying has no place in calculating BNSF's "actual incremental cost of fuel."

BNSF argues that its Phantom Fuel Price Defense is permitted under the Board's *Fuel Surcharges* rulings. BNSF points specifically to the Board's *Fuel Surcharges III* decision holding that if a carrier used a HDF index – which the Board called the "EIA" index – the shipper could not challenge its use, whereas "[u]se of an

alternative index may be subject to challenge,” thus creating a “safe harbor” for the EIA index:

Because the EIA index has been the subject of notice and comment . . . we conclude that it is a reasonable index to apply to measure changes in fuel costs for purposes of a fuel surcharge program. Thus it provides a “safe harbor” upon which carriers can rely for an index. Use of an alternative index may be subject to challenge.

Fuel Surcharges III at 11.

Fuel Surcharges provides absolutely no legal basis for BNSF’s Phantom Fuel Price defense. The Board ruled in *Fuel Surcharges III* that if a shipper filed a fuel surcharges complaint at the Board, and the carrier was using an HDF index, the shipper could not ask the Board to prescribe the use of a different index. However, if a carrier uses an index other than HDF, the “index may be subject to challenge.” *Id.*

In this case, Cargill is not asking the Board to order BNSF to use an index other than HDF. Therefore, its relief requests are fully consistent with the “safe harbor” provisions set forth in *Fuel Surcharges III*. Nor does the “safe harbor” provision in any way impact how the Board should calculate BNSF’s “actual incremental cost of fuel.” *Cargill* at 5. That cost must be calculated using BNSF’s actual fuel costs, not some phantom costs that BNSF does not incur.²⁴

²⁴ Crowley/Mulholland also demonstrate that BNSF’s Phantom Fuel Price Defense is riddled with numerous technical errors in its make-up and application. See Crowley/Mulholland Reb. V.S. at 5-6, 45-48.

F. BNSF's Profiteering Is Not Excused Under Its *De Minimis* Profiteering Defense

BNSF's *De Minimis* Profiteering Defense asks the Board to ignore, at a minimum, its profit calculation of { } on grounds that profits of this magnitude do not provide "any basis for concern" because "some degree of over- or under-recovery would be expected of any fuel surcharge mechanism" due to "fuel efficiency" factors outside BNSF's "control" such as "[t]he mix of traffic," "decline in traffic volumes," "the global economy," *etc.* Fisher Reply V.S. at 36-37.

BNSF's *De Minimis* Profiteering Defense is a red-herring. The governing legal standard requires that BNSF be earning "substantial" profits before an unreasonable practice finding is made. *Cargill* at 5. Both Cargill's profit calculation (\$560.9 million) and BNSF's profit calculation { } qualify as "substantial."

Moreover, BNSF's claims that the level of its fuel consumption on a unit output basis is beyond its control are simply not credible. In the last decade, BNSF has implemented an aggressive company-wide program to reduce its locomotive fuel expenses. *Cargill Op.* at 31-34. {

} Contrary to Mr. Fisher's assertions, improved fuel consumption is well within BNSF's "control" and BNSF is successfully "control[ling]" it.

Alternatively, BNSF argues the Board should overlook { } in profits because BNSF spends more money than that on new fuel efficient locomotives, and that these monies "are not captured in fuel-cost recovery analyses that consider only

fuel consumption.” Fisher Reply V.S. at 38. This contention is also without merit. BNSF recovers its locomotive investment costs in its base rates, as adjusted. BNSF has been earning record profits on all of its traffic, including its Ag and OF traffic. *See* Crowley/Mulholland Reb. V.S., Ex. 14. Shippers are already compensating BNSF for these, and other, investments in their rates. They are not required to pay for these investments twice, which is why the Board permits fuel surcharges to recover only actual incremental fuel cost increases.

IV.

CARGILL’S REQUESTED RELIEF IS REASONABLE

BNSF argues that Cargill’s requested relief is unreasonable. BNSF Reply at 64. That is clearly not the case.

A. BNSF’s Liability Is Clearly Established as Is the Appropriate Remedy in this Phase of the Case

Cargill alleged in its Complaint that BNSF was committing an unreasonable practice by using the ATI as a profit center (§ 7). Cargill also alleged that BNSF was committing an unreasonable practice because the ATI formula bore no reasonable nexus to BNSF’s actual fuel consumption (§ 6). Cargill has now proven these allegations are correct: BNSF is using the ATI to generate massive profits, and the ATI step function bears no reasonable nexus to BNSF’s actual fuel consumption for its Ag and OF traffic.

Cargill’s evidence also demonstrates the appropriate remedy in this phase of the case:

- The Board should prescribe ATI step functions of (i) one cent per loaded car-mile for each 5.13 cent increase in the price of HDF on Ag shipments and (ii) one cent per loaded car-mile for each 4.70 cent increase in the price of HDF. These step functions closely track the actual step functions that BNSF should have applied between 2006 and 2010 so that its actual fuel surcharge revenues closely matched its actual incremental fuel cost increases on the Ag and OF traffic subject to the ATI. They also produce a reasonable nexus between the formula step rates and BNSF's actual fuel consumption for its Ag and OF traffic.

- The Board should prescribe that the strike price on all ATI shipments currently subject to a \$1.25 per HDF gallon strike price be changed to \$1.298 per HDF gallon. The \$1.298 per HDF gallon strike price represents the reasonable HDF equivalent to the \$0.73 per gallon fuel price BNSF claims is embedded in its base rates.

- The Board should prescribe that the fuel surcharge collections under the ATI be initiated at the strike price plus one-half of the first step increment. This change is necessary to prevent BNSF from collecting a fuel surcharge when it has incurred no actual incremental fuel cost increase in its base rates.

- The Board should prescribe the fuel surcharge tables set forth in Crowley/Mulholland Exhibit No. 13 for ATI application. These tables incorporate the relief Cargill requests the Board to prescribe: modified step functions, strike price, and first step implementation.

- The Board should find that BNSF's unlawful surcharge practices have directly resulted in Cargill being overcharged by \$26,794.305 (plus interest) during the time period April 19, 2008 to December 31, 2010. Crowley/Mulholland Reb. V.S. at 50.

B. Prescription of Separate Step Functions for Ag and OF Is Required

BNSF argues that Cargill errs in requesting separate step function relief for Ag and OF traffic because BNSF has a "single carload" fuel surcharge program that applies to Ag and OF traffic. BNSF Reply at 48.

BNSF also argues that its decision to utilize a "single carload" program is reasonable because (i) {

};²⁵ (ii) Ag and OF traffic {

};²⁶ (iii) development of a separate shuttle train

fuel surcharge {

};²⁷ and (iv) it might be {

} are "Ag shuttle traffic."²⁸

Finally, BNSF argues that the Board's decision in *Dairyland* precludes Cargill from developing separate step function relief for Ag and OF traffic. BNSF Reply at 49. None of these proffered excuses justifies BNSF's action in unreasonably lumping

²⁵ *Id.*

²⁶ Anderson Reply V.S. at 5.

²⁷ Lanigan Reply V.S. at 10

²⁸ *Id.* at 9.

Ag and OF traffic together, and applying the same fuel surcharge step function to each traffic group.

1. BNSF's Has Separate Mileage-Based Fuel Surcharge Programs for Its Ag and OF Traffic That Should Be Separately Evaluated

BNSF's claim that it has a single fuel surcharge program for Ag and OF traffic does not square with its public representations to this Board, to the SEC, to the general public on its website, {
}.

BNSF told the Board in its written comments in *Fuel Surcharges* that its "goal is to collect fuel surcharges no higher than the additional cost of fuel, reflecting the operational requirements of each business unit."²⁹ Similarly, Tom Hund, then BNSF's Chief Financial Officer, testified that BNSF's goal was to align its mileage-based fuel surcharges factoring in "fuel consumption" for each BNSF "business unit."³⁰ BNSF makes similar representations in its SEC filings.³¹

Consistent with these representations, BNSF implemented mileage-based fuel surcharge programs on its Coal and Ag business unit traffic in January of 2006, and, after being ordered to do so by the Board, instituted a catch-all third program in April of 2007 to apply to all regulated OF carload traffic, { } of which is industrial products

²⁹ *Id.*, BNSF Comments (Oct. 2, 2006) at 4.

³⁰ *Id.*, Public Hearing (May 11, 2006) (Tr. at 260, and PowerPoint Slides).

³¹ *See, e.g.*, BNSF 2010 Annual Form 10-K at 9 ("Fuel surcharges are calculated differently depending on the type of commodity transported.")

traffic administered by BNSF's Industrial Products business unit.³² BNSF's website similarly refers to its mileage-based fuel surcharges as falling into three programs: "Coal Unit Train," "Grains & Feed (Ag Products)," and "All Other Freight."

BNSF set up a business unit-based fuel surcharge program for a reason:

{

} *See Anderson Reply V.S., Ex. 5*

workpapers.

Cargill's development of different step functions for its Coal and Ag traffic comports with how BNSF has represented these fuel surcharge programs to the public {

}.

2. Different Step Functions Are Required Because BNSF's Ag Traffic Is Far More Fuel Efficient Than Its OF Traffic

BNSF claims that Ag traffic and OF traffic should be lumped together for fuel surcharge purposes because they have the same fuel consumption characteristics. That assertion is demonstrably false. Nor do its other rationales provide any reasoned basis for not having separate step functions for its Ag and OF traffic.

³² Cargill Op. at 35.

³³ *See* Cargill Op. at 35 n.38 (citing D-14158) (included in Cargill's opening workpapers).

- BNSF's claim that {

}³⁴ is not correct. Crowley/Mulholland reviewed all BNSF

trains subject to the ATI between 2006 and 2010 and concluded:

During the [2006 to 2010] study period, approximately { } of all Ag traffic was unit train traffic whereas unit trains composed less than { } of all Other Freight traffic. Additionally, the data show that for shipments moving in carload service, Ag traffic generally moves on longer trains and is handled less (e.g., fewer I&I switching events) than Other Freight traffic.

Crowley/Mulholland Op. V.S. at 27.

- BNSF's claim that Ag and OF traffic {

}³⁵ is also incorrect.

Crowley/Mulholland show that between 2006 and 2010, BNSF's Ag traffic averaged { } MPG whereas its OF traffic averaged { }, both calculated using actual shipment miles. Crowley/Mulholland Reb. V.S. at 39-40. Similarly, {

},³⁷ show that {

}. Finally, between 2006 and 2010, BNSF's

Ag traffic was { } than its Other Freight traffic when measured on a GTM per gallon basis.³⁸

³⁴ BNSF Reply at 48.

³⁵ Anderson Reply V.S. at 5.

³⁶ See Crowley/Mulholland Reb. V.S. at 19-20, 37-40.

³⁷ See Counsel's Rebuttal Exhibit.

³⁸ See Crowley/Mulholland Op. V.S. at 28.

- BNSF’s claim that development of separate shuttle train fuel surcharges {

}

- BNSF’s claim concerning the {
} is also not credible. Lanigan Reply V.S. at 10-11. BNSF simply {

}.

3. Prescription of Different Step Functions Complies with Governing Precedent

BNSF claims that Cargill’s request that the Board prescribe separate step functions for Ag and OF traffic violates the Board’s ruling in *Dairyland*. BNSF Reply at 49. In *Dairyland*, the complainant shipper challenged a fuel surcharge that applied to a single commodity – coal. *Id.* at 3. The Board did not address, much less resolve, whether there was any legal prohibition in seeking a prescription of separate step functions in a case involving multiple commodities.

On point are the Board’s rulings in *Fuel Surcharges*. In that case, the Board found that use of percent-of-price fuel surcharges constituted an unreasonable practice. The Board did so, *inter alia*, to avoid having shippers with high rates “cross-subsidize” shippers with lower rates. *See E.I. DuPont De Nemours & Co. v. CSX Transp.*

Inc., STB Docket No. 42099 (STB served June 30, 2008) at 11 (summarizing the Board's *Fuel Surcharges* decisions).

The same form of cross-subsidy exists here. BNSF is overcharging both its Ag and OF shippers, and in the process is overcharging Ag shippers more because Ag traffic is more fuel efficient than OF traffic. The proper remedy here is to eliminate both the over-recovery and the cross-subsidy, which is why the Board should prescribe different step functions for BNSF's Ag and OF traffic. This result is also exactly in line with {

} D-14158.

Prescribing different step functions for Ag and OF traffic also is fully consistent with the Board's directives that fuel surcharges bear a "reasonable nexus to fuel consumption." *Fuel Surcharges III* at 9. The step functions Cargill asks the Board to prescribe reflect BNSF's actual fuel consumption for Ag and OF traffic over the past five years. This consumption is significantly different, reflecting the fact that transportation of Ag traffic is more fuel efficient than transportation of OF traffic.

Use of separate step functions creates a better fit, and a closer nexus, to BNSF's actual fuel consumption than use of a single step function that averages the disparate fuel consumption characteristics of Ag and OF traffic. *Crowley/Mulholland Reb. V.S.* at 37-39.

C. Granting the Requested Relief Is Not Unfair to BNSF

BNSF has engaged in an unreasonable practice by using the ATI as a profit center due to design flaws in the ATI. Throughout its Reply, BNSF argues that it should

be given a pass on any form of regulatory relief. *See, e.g.*, BNSF Reply at 59-60.

However, BNSF should not be given a pass here because it clearly violated the law by misusing the ATI.

The remedy Cargill seeks in Phase I of this case is a reasonable one. The Board's prescription of reasonable fuel surcharge practices corrects the unreasonable features in the ATI, and gives BNSF the benefit of the prescription going forward: a shipper cannot seek any additional prescriptive relief unless it first meets the legal standards governing modification or removal of the prescription.³⁹ BNSF also retains the right to petition the Board to modify or remove the prescription under these standards.⁴⁰

Cargill has met its burden of proof in this case by developing surcharge revenues, base fuel costs and incremental fuel costs for every single shipment that moved under the ATI for a five year period – { }. *See, e.g.*, Crowley/Mulholland Reb. V.S. at 2, Table 1. This is a massive undertaking, but one that is required under governing Board precedent. Cargill's evidence shows – as does BNSF's – that BNSF has been collecting, and continues to collect, fuel surcharges under the ATI that are substantially in excess of BNSF's actual incremental fuel cost increases.

It is time for BNSF's unreasonable fuel surcharge practices to stop. Cargill respectfully requests that the Board do so by making the liability findings, and issuing the prescriptive relief, it seeks in Phase I of this case. Cargill also requests that in Phase II of

³⁹ 49 U.S.C. § 722(c) ("The Board may, at any time . . . because of material error, new evidence, or substantially changed circumstances . . . change an action of the Board.")

⁴⁰ *Id.*

this case, the Board promptly award Cargill damages in the full amount of the overcharges it paid as a result of BNSF's unreasonable fuel surcharge practices.

CONCLUSION

Cargill requests that the Board make the findings, and grant the relief, Cargill requested in its Opening Statement, as modified in this Rebuttal Statement.


Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2011, I caused copies of the foregoing Rebuttal Statement and electronic workpapers to be served by hand upon counsel for Defendant BNSF Railway Company, as follows:

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**COUNSEL'S REBUTTAL EXHIBIT
REDACTED**

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Cargill, Incorporated)
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Complainant.)
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 v.)
) **STB Docket No. 42120**
)
BNSF Railway Company)
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Defendant.)
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8	Comparison of Crowley/Mulholland and Fisher Algebra
9	{ }
10	Comparison of Crowley/Mulholland Approach, Fisher Approach, and Fisher Misrepresentation, Median Train Example
11	Statement of Combined Fuel Surcharge Overpayments on Regulated Ag and Other Freight Traffic by Cargill to BNSF due to Improperly Calibrated Step Function - - April 19, 2008 through 2010
12	Demonstration of Regression analyses – Revised to Reflect Updated Ag/Other Traffic Grouping
13	Restated BNSF Mileage-based Fuel Surcharge Tables
14	BNSF Revenues And Profits - - 2006 to 2010
15	BNSF Carloads Evaluated, Surcharges Collected, Incremental Fuel Costs Incurred, and Overpayment – 2006 - 2010

I. INTRODUCTION

We are Thomas D. Crowley and Robert D. Mulholland, economists and President and a Vice President, respectively, of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems. We are the same Thomas D. Crowley and Robert D. Mulholland that presented a Verified Statement ("OVS") as part of Cargill, Incorporated's ("Cargill") Opening Statement in this proceeding on August 25, 2011. Copies of our credentials are included as Exhibit No. 1 and Exhibit No. 2 to our OVS.

We have been requested by Counsel for Cargill to address certain portions of BNSF Railway Company's ("BNSF") Reply Evidence filed in this proceeding on October 24, 2011. Specifically, we were asked to address certain portions of the verified statements presented by John P. Lanigan, Paul B. Anderson and Benton V. Fisher.

BNSF disagreed with the results of our analysis and through a series of adjustments changed the stated purpose of its fuel surcharge program from recovering incremental fuel costs to one that recovers total fuel costs including a reverse application of its fuel hedging program. Through this process and as will be demonstrated in this Rebuttal Verified Statement, BNSF double recovers some fixed fuel cost elements, relies on faulty logic and fails to calculate incremental fuel costs.

In our OVS, we calculated the amount by which BNSF over recovered its incremental fuel costs on the traffic for which BNSF provided waybill data. Line 1 of Table 1 below summarizes the results of our OVS. Specifically, we determined the amount of fuel surcharge revenues reflected in BNSF's provided waybill data for all provided movements (Column (3)). We then calculated the incremental fuel costs above BNSF's strike-price of \$0.73 per gallon that BNSF

incurred for all provided movements (Column (4)). Finally, we subtracted the incremental fuel costs from the surcharge revenues collected for all provided movements (Column (5)). We demonstrated in our OVS that BNSF's fuel surcharge over-recovered \$560.9 million in fuel surcharge revenues associated with transporting traffic to which the mileage based fuel surcharge ("MBFSC") was applied during the 2006 through 2010 time period.

BNSF agrees with our calculation of total fuel surcharge revenues. However, BNSF disagrees with our calculation of BNSF's incremental fuel costs, which it restates in its Reply evidence. BNSF made four broad adjustments to our calculation of incremental fuel costs, as shown in Table 1 below. Line 2 through Line 5 identify and quantify each adjustment made by BNSF to Cargill's calculation of incremental fuel costs in its effort to demonstrate that the BNSF fuel surcharge revenues did not over-recover BNSF's incremental fuel costs. As shown in Table 1, even after all of BNSF's adjustments to our calculation of incremental costs are made, BNSF estimates that it over recovered { } in revenues through its fuel surcharge program from 2006-2010 on the traffic for which BNSF provided waybill data.

Table 1
Summary of Impact of BNSF Reply Adjustments to Cargill Opening Analyses

<u>Item</u> (1)	2006-2010 <u>Total</u> <u>Carloads</u> (2)	2006-2010 <u>Total Fuel</u> <u>Surcharges</u> (3)	2006-2010 <u>Total Incr.</u> <u>Fuel Cost</u> (4)	2006-2010 <u>Total Over-</u> <u>Recovery</u> (5)
1 Cargill Opening	{ }	\$ { }	\$ { }	\$ 560.869,072
<u>BNSF Adjustments</u>				
2. URC'S Costing Adjustments Non-variable Loco Fuel	{ }	\$ { }	\$ { }	\$ (120,353,871)
3. Adjustment	{ }	\$ { }	\$ { }	\$ { }
4. Non-Loco Fuel Adjustment	{ }	\$ { }	\$ { }	\$ { }
5. Hedging Adjustment	{ }	\$ { }	\$ { }	\$ { }
6. BNSF Reply ¹	{ }	\$ { }	\$ { }	\$ { }

1/ Sum of lines 1 through 5

{ }

Our rebuttal testimony demonstrates that each of BNSF's adjustments (Line 2 through Line 5) is not justified, mis-calculated and/or provides no support for BNSF's claimed position that its fuel surcharge mechanisms are intended to only recover incremental fuel costs. Importantly, BNSF's incremental cost calculation methodology is generally derived using our overall framework. BNSF's URCS costing adjustments (Table 1, Line 2) are not credible because BNSF replaces actual movement data inputs with system average data inputs which creates a disconnect between BNSF's operations and its incremental cost calculations. BNSF's non-variable locomotive fuel adjustment (Table 1, Line 3) is not credible because it converts BNSF's incremental costs to total costs. BNSF's non-locomotive fuel adjustment (Table 1, Line 4) is not credible because BNSF's fuel surcharge formula was never intended by BNSF to recover non-locomotive fuel and because non-locomotive fuel is recovered through adjustments to the base rate. BNSF's hedging adjustment (Table 1, Line 5) is not credible because the net cost of fuel to BNSF is based on its hedged fuel costs and not the price of fuel when BNSF purchases it.

As shown in Table 1 above, after BNSF made its unwarranted adjustments to our calculation of incremental fuel costs, BNSF still calculated that it had over recovered {
} in fuel surcharge revenues due to the structure of, and inputs to, its fuel surcharge program formula. Specifically, the formula step-function (one cent per loaded car-mile surcharge increase for every four cent increase in HDF price) is too steep, and the formula starting point (HDF = \$1.25 per gallon) is too low. Simply stated, because of its design flaws, the surcharge formula produces revenues that bear no reasonable nexus to the fuel costs it incurs.

BNSF agrees that its step-function (a one cent increase in per loaded car-mile surcharge for every four cent increase in HDF fuel price, or a 4 cent step length) is too steep. However, BNSF takes the position that its step-function is unassailable because it is based on the use of a surrogate

price for which the Board granted “Safe Harbor.” We do not dispute that BNSF is justified in using the HDF as the index upon which its surcharge program step function is based (which is what the “Safe-Harbor” ruling actually granted). However, we demonstrated in our OVS and supporting work papers that the use of HDF price as a surrogate for BNSF fuel price without accounting for the variable spread between the two commodity prices is unreasonable, and that an adjustment to the step-function is required to account for the variable spread. The extent to which the improperly calibrated step-function over recovers incremental fuel costs varies with variations in the surrogate fuel price. This is because the effect of the too-short step length compounds as fuel prices increase. As discussed below, the correct step length for the fuel surcharge formula is 5.13 cents for Ag traffic and 4.70 cents for Other Freight traffic.¹

BNSF does not agree that its starting-point is too low. In support of its selection of \$1.25 per gallon as the HDF equivalent of its stated \$0.73 per gallon fuel strike-price (i.e., the locomotive fuel price it claims are implicit in its base rates), BNSF claims that it made a reasonable assumption based on information available to it before its surcharge program took effect. BNSF offers no proof that its assumption was reasonable. In contrast, in both our OVS and again in our Rebuttal filing, we offer several demonstrations which prove that based on data that was available to BNSF before and since it implemented its program, the HDF price it selected is not equivalent to its stated strike-price. In our OVS, we showed that the correct strike-price equivalent is actually \$1.298 per gallon HDF price, a difference of 4.8 cents.

As we explained in our OVS, even if BNSF’s chosen HDF equivalent price was in fact equivalent to its strike-price, it would be unreasonable to collect surcharges beginning at that price

¹ The step length is 4.94 when considering all traffic together. In our OVS we determined that the correct step length was 5.18 for Ag traffic and 4.57 for Other Freight traffic. In Rebuttal we have reclassified some movements and recalibrated the step length slightly.

level, because BNSF incurs no incremental fuel costs at its strike-price (all fuel costs are recovered through BNSF's base rates at the strike-price). We showed that the starting point should actually be at the HDF price equivalent plus one-half step price, which is the price point at which BNSF incurs incremental fuel costs equaling ½ cent per loaded car-mile. BNSF rejects our position without any justification for doing so. As a result, BNSF over-recovers approximately one-half cent² per loaded car-mile on every movement solely because it inappropriately collects surcharges before it incurs incremental fuel costs.

Nonetheless, BNSF was left with a problem after it restated our calculation of BNSF's incremental fuel costs associated with the traffic to which the surcharge was applied. As shown in Table 1, BNSF determined that its fuel surcharge receipts eclipsed its incremental fuel costs incurred by { } from 2006-2010. BNSF's calculation of its total incremental fuel costs can be derived by multiplying BNSF's calculation of the gallons it consumed to move the traffic³ by BNSF's actual incremental fuel price per gallon at the time of the movement.⁴ BNSF calculated that it consumed { } gallons of fuel to move the traffic at a weighted average incremental fuel price of { } per gallon, for a total of { } in total incremental fuel costs.⁵

In an attempt to justify this { } over recovery, BNSF conducted an exercise in which it replaced BNSF's actual incremental fuel costs with the incremental fuel costs BNSF's improperly calibrated formula inferred it should have incurred. BNSF did this by subtracting its assumed strike-price equivalent HDF price of \$1.25 per gallon from the monthly HDF price per

² BNSF over recovers one cent per loaded car-mile on approximately half of the movements to which the fuel surcharge is applied due to this practice.

³ BNSF's consumption calculation includes fuel volumes it should not include: namely non-variable locomotive fuel and non-locomotive fuel.

⁴ BNSF's incremental fuel price per gallon is inaccurate because it reflects improper hedging and non-locomotive fuel price adjustments.

⁵ See: work paper "BNSF Phantom Cost Breakdown.xlsx" at range C73:G73.

gallon for the 2006-2010 time period to calculate an inferred monthly incremental fuel price per gallon. BNSF then calculated a surrogate incremental fuel cost by multiplying BNSF's calculation of the gallons it consumed to move the traffic by this inferred incremental fuel price per gallon at the time of the movement. BNSF calculated that it consumed { } gallons of fuel to move the traffic at a weighted average inferred incremental fuel price of { } per gallon, for a total of { } in total incremental fuel costs.⁶

BNSF then compared this phantom incremental cost figure to its actual surcharge revenues and concluded that if BNSF had actually incurred this level of costs then BNSF would not have over recovered revenues through its fuel surcharge program. This "demonstration" only serves to underscore the fact that BNSF's fuel surcharge formula bears no reasonable nexus to BNSF's incremental fuel costs. If BNSF actually incurred the costs implicit in its formula then its formula would be calibrated properly. However, BNSF's own evidence shows that its surcharge formula vastly overstates the incremental costs BNSF incurs. Even using BNSF's flawed incremental cost calculations, BNSF's surcharge formula is shown to overstate its incremental costs by { }.⁷

BNSF's failure to select the correct strike-price equivalent HDF value, initiate fuel surcharge collection only when its fuel price exceeded its strike-price, and account for the dynamic relationship between its surrogate price and its actual fuel prices combine to explain why it vastly over recovered its incremental fuel costs through its fuel surcharge program from 2006-2010.⁸

Our rebuttal testimony expands on the above under the following topical headings:

II. Mr. Fisher's Challenges To Our Incremental Fuel Cost Calculations Are Without Merit.

III. BNSF's Failure To Correctly Design Or Adjust Its Fuel Surcharge Program

⁶ See: work paper "BNSF Phantom Cost Breakdown.xlsx" at range I73:L73.

⁷ { }

⁸ BNSF over recovered { } by its own calculation.

Formula Reveals BNSF's Intentions To Use The Fuel Surcharge Program As A Profit Center.

IV. Conclusion

II. MR. FISHER'S CHALLENGES TO OUR INCREMENTAL FUEL COST CALCULATIONS ARE WITHOUT MERIT

A. MR. FISHER'S CHARACTERIZATION OF OUR MODEL IS IN ERROR

In this section of our rebuttal verified statement, we demonstrate that the calculations we presented in our OVS are still correct and that Mr. Fisher's attempt to discredit our evidence falls far short of achieving its objective. The remainder of this section of our rebuttal verified statement is summarized under the following topical headings:

1. Neither Party Developed URCS Phase III Costs Using An URCS Phase III Model
2. Our Model Calculates Actual Costs for Every Individual Movement Based On Each Movement's Actual Operations
3. Our Model Calculates LUM-Based Incremental Fuel Costs Accurately
4. Our Model Appropriately Estimates Empty Train Weights
5. Our Model Reflects Local And Way Train Statistics
6. Our Model Reflects The Actual I & I Switching Operations For The Studied Shipments

1. Neither Party Developed URCS Phase III Costs Using An URCS Phase III Model

Mr. Fisher incorrectly asserts that we "started with the STB's regulatory costing model to identify the fuel costs associated with the MBFSC shipments."⁹ We did not. Mr. Fisher then declares that we "improperly ignored the STB's prohibition of movement-specific adjustments to

⁹ See Fisher Reply Verified Statement, p. 11.

URCS variable costs.”¹⁰ Mr. Fisher’s reference to STB prohibitions on adjustments to URCS Phase III costing is irrelevant to our model, which did not “start with” the URCS Phase III costing model.

The URCS Phase III model develops total movement variable costs and is most frequently used in rate reasonableness cases to determine if the STB has jurisdiction over the issue traffic and to identify the floor for a STB prescribed rate. In this case, we are not evaluating total movement revenues relative to total movement variable costs. Instead, we are evaluating fuel surcharge revenues collected under The Assailed Tariff Item (“ATI”) and, as expressly directed by the Board, “the actual incremental costs of fuel incurred in providing rail services”¹¹ to the ATI traffic and we do this using an analytical framework that we developed specifically to calculate incremental fuel costs for each movement provided by BNSF during discovery in this proceeding. Our model uses some URCS unit costs for fuel as inputs because they are the best available data.¹² Our model calculates the most accurate fuel costs attributable to each studied railcar based on the actual movement characteristics for that shipment.¹³

Mr. Fisher did exactly the same thing. Since the URCS Phase III model creates movement costs, not incremental fuel costs, Mr. Fisher also developed a model to make his incremental fuel cost calculations. His model differs from ours, but, as discussed below, our two models produce different incremental costs due to the fact that we used more actual traffic and operating (“T & O”) inputs in our calculations than Mr. Fisher did. Stated another way, this is not a case where one party developed URCS Phase III movement costs, and the other did not, because URCS III does not develop actual incremental fuel cost increases. The difference between our incremental cost

¹⁰ See Fisher Reply Verified Statement, p. 13.

¹¹ Cargill, Inc. v. BNSF Ry., STB Docket No. 42120 (served Jan. 4, 2011) at sheet 5.

¹² BNSF refused to provide its internal management costing data related to the calculation of incremental fuel costs associated with its fuel surcharge programs.

¹³ {

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calculations. and Mr. Fisher's. boils down to the use of different T & O inputs, nothing more or nothing less.

2. Our Model Calculates Actual Costs For Every Individual Movement Based On Each Movement's Actual Operations

Mr. Fisher states that we "calculate the variable fuel costs associated with the MBFSC shipments based on costs [we] extracted from the STB's URCS model."¹⁴ Mr. Fisher recognizes for the only time in his statement that while our analysis relies on inputs from the BNSF URCS data, it is not an URCS Phase III analysis. We were not attempting to determine the total variable movement costs for any of the shipments but rather we were seeking only to quantify the incremental fuel costs associated with the shipments using the best available data inputs.

Mr. Fisher acknowledges that we described our methodology completely and thoroughly in the body of our OVS. including "10 detailed steps for determining [our] movement inputs as a separate 14-step approach to assign the URCS fuel costs."¹⁵ We did not "assign URCS fuel costs" to moves based on the presumption that they moved in trains of system average configuration. Rather, we calculated fuel costs for each movement using the best available data inputs.

Mr. Fisher further acknowledges that "when calculating the URCS costs for a shipment, the standard approach is to multiply the number of URCS unit costs by the corresponding number of service units, or amount of activity associated *with that specific shipment*, such as the number of ton-miles, the number of switching events, etc." (emphasis added)¹⁶

Mr. Fisher complains that we "undertook a series of calculations that made many 'movement-specific' adjustments to the URCS costs,"¹⁷ and that we "improperly ignored the STB's

¹⁴ See Fisher Reply Verified Statement, p.13.

¹⁵ See Fisher Reply Verified Statement, p. 14.

¹⁶ Id..

¹⁷ Id.

prohibition of movement-specific adjustments to URCS variable costs, and as a result generated flawed and inconsistent variable costs for the MBFSC shipments.”¹⁸

Mr. Fisher states that our “adjustments” are impermissible because the STB in *Major Issues In Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (decision served Oct. 30, 2006) (“*Major Issues*”) limited the parties “to the use of the unadjusted URCS Phase III movement costing program and disallow[s] movement-specific adjustments other than those automatically made by URCS.”¹⁹ Mr. Fisher conveniently left out the following qualifying sentence from *Major Issues*: “The variable costs used in *rate reasonableness proceedings* will be the system-average variable cost generated by URCS, using the nine movement-specific factors inputted into Phase III of URCS.”²⁰

Mr. Fisher quotes from *Major Issues* and the more recent *Entergy v. UP* through rate prescription proceeding in an attempt to develop support for the notion that our fuel cost analysis violates STB unreasonable practice proceeding protocol. It does not.

Specifically, Fisher includes the following quotes:

There are several underpinnings to this conclusion. First, as a matter of econometric theory, piecemeal or incomplete adjustments to URCS are suspect. There are hundreds of individual expense categories that URCS uses to estimate the variable cost of a movement and the parties do not seek to adjust all of them. Indeed, many of the expense categories could not be changed, because movement-specific information is unavailable. Yet selective replacement of system-average costs with movement specific costs may bias the entire analysis, rendering the modified URCS output unreliable.²¹

And

We do not, however, accept UP’s locomotive and private rental car adjustments. These are precisely the kind of selective movement-specific

¹⁸ See Fisher Reply Verified Statement, p. 13.

¹⁹ See Fisher Reply Verified Statement, p. 14.

²⁰ See *Major Issues*, p. 60, emphasis added.

²¹ *Major Issues*, pp. 51-52.

adjustments to URCS that undermine the reliability of the costing model. *Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1), slip op. at 50-51 (STB served Oct. 30, 2006) (noting that piecemeal movement-specific adjustments were expensive and were not leading to a more accurate result than using the system-average figures). Just as we prohibit such piecemeal adjustments to URCS in rate cases, so too shall we prohibit such adjustments to URCS in [Section] 10705 complaints.²²

In *Major Issues*, the Board clarified that a key reason for its decision was that “there are hundreds of individual expense categories that URCS uses to estimate the variable cost of a movement and the parties do not seek to adjust all of them.”²³ This is not a concern in a fuel surcharge unreasonable practice case because we are not attempting to determine movement variable costs. We are developing only incremental fuel costs (not the total variable costs) for studied movements. We are dealing with only a single expense category and the adjustments thereto do not alter or undermine some other calculation of total movement variable costs that are used for some other regulatory purpose.

Moreover, the Board concluded in *Major Issues* that movement-specific adjustments that the Board had been permitting in rate cases because they produced more accurate cost results than system average costs often were expensive for the parties to create, and frequently offset each other, so use of system average costs made the process less expensive, easier and produced the same answer. Here, by contrast, developing actual incremental cost inputs is no more expensive than developing corresponding system average cost inputs, and the use of the disputed actual versus system average cost inputs make a major impact on the resulting incremental cost calculations.

²² *Entergy Arkansas, Inc. v. Union Pacific Railroad Co.*, STB Docket No. 42104, slip op. at 13 (served Mar. 15, 2011).

²³ *Major Issues*, p. 51.

3. Our Model Calculates LUM-Based Incremental Fuel Costs Accurately

Mr. Fisher states that we “did not follow the standard URCS costing approach of multiplying the URCS costs per LUM [locomotive unit mile] by the locomotive unit-miles assigned to a shipment... [we] transformed the URCS unit cost per LUM to a cost per GTM [gross ton mile], and developed URCS variable locomotive fuel costs based only on the gross-ton miles and switch-engine minutes. Specifically, [we] multiplied the URCS cost per LUM by the average number of locomotives that [we] calculated for the trains that handled the carload, then divided that number by the average gross tons of the train.”²⁴ Fisher claims that this results in a cost per GTM and “ignores the manner by which the majority of BNSF’s locomotive fuel costs are assigned to shipments in URCS.”²⁵ Fisher’s statements are false. Our calculation replicates exactly “the manner by which the majority of BNSF’s locomotive fuel costs are assigned to shipments in URCS.” In his Figure 1²⁶, Mr. Fisher displays a simple algebraic formula that he claims demonstrates that we “transformed” the URCS unit costs per LUM to a unit cost per GTM, which he implies renders our calculation invalid. Mr. Fisher’s confusion over the simple algebra we employed is puzzling. In fact, the validity of our formula is confirmed {

}²⁷

In URCS, total locomotive fuel costs are allocated to three service factors. i.e., gross ton-miles (“GTM”), locomotive unit miles (“LUM”), and switch engine minutes (“SEM”). The GTM and LUM components are mileage-based and the SEM component is time-based. This allocation recognizes that locomotive fuel costs are a function of: (1) the shipment weight (which is captured

²⁴ See Fisher Reply Verified Statement, pp. 17-18.

²⁵ See Fisher Reply Verified Statement, p. 18.

²⁶ See Fisher Reply Verified Statement, p. 18.

²⁷ {

}

through application of the GTM cost component); (2) the number of locomotives (which is captured through application of the LUM cost component); and (3) the amount of switching (which is captured through application of the SEM cost component).

Movement LUM costs are determined based on the number of locomotives used to move a shipment and the mileage associated with that shipment.

Mr. Fisher notes that we restated the LUM component of locomotive fuel costs on a GTM basis in our development of movement incremental fuel costs. We did this based on the number of locomotives and gross tons associated with the train on which each shipment moved. As such, our model uses simple algebra to put the two mileage-based locomotive cost components on the same basis. We did this to simplify the modeling process. It has no bearing on our answer. As shown in Exhibit No. 8,²⁸ we demonstrate that the conversion of LUM unit costs to GTM unit costs results in the same incremental cost determination for each shipment in the study group.

Mr. Fisher devotes several pages of his reply statement to our conversion of LUM costs to GTM costs, claiming that our conversion by itself somehow renders our cost calculation unreliable. This is simply not true. Evaluation of { }. Our formula and Mr. Fisher's formula both produce exactly the same results if the same inputs are fed into each model. That is, Fisher's "correct" methodology employs an algebraically equivalent formula to the one we used. The driver of the differences between Fisher's calculation and ours lies not in the formula that we employed but rather in the inputs to the formula as shown below.

Formula Used By Fisher

{

²⁸ Exhibit No. 1 through Exhibit No. 7 were filed with our OVS.

4.

}

Formula Used By Cargill

Our approach can be expressed as follows:

Shipment LUM Fuel Cost per Car = **Actual** Shipment LUM x System Average Fuel Cost per LUM

Where:

Actual Shipment LUM = **Actual** Total Train LUM x **Actual** Shipment Share

Actual Total Train LUM = Actual Train Miles x **Actual** Locomotives per Train

Actual Shipment Share = Actual Shipment GTM / **Actual** Total Train GTM

Actual Shipment GTM = Actual Gross Tons x Actual Train Miles

Actual Total Train GTM = Actual Train Miles x **Actual** Gross Tons per Train

The above Fisher formula produces precisely the same results as our formula, {

}²⁹ Fisher's complaints regarding our use of a simple algebraic formula

to restate the units is a smoke screen designed to obscure his actual argument that we should not have calculated actual incremental fuel costs but rather we should have assigned system average T & O factors to every shipment.

Table 2 below contains a comparison of the source of the inputs that we used to calculate incremental fuel costs for each shipment in the study to those used by Mr. Fisher.

²⁹ {

}

Table 2 <u>Comparison Of Inputs</u>		
<u>Item</u> (1)	<u>Crowley/Mulholland Source</u> (2)	<u>Fisher Source</u> (3)
1. Train Miles	Actual	{ }
2. Net Tons per Car	Actual	{ }
3. Tare Weight per Car	Actual	{ }
4. Gross Tons per Train	Actual	{ }
5. Locomotives per Train	Actual	{ }
6. URCS Fuel Unit Cost per LUM	System Average 1/	{ } 1/
1/ Actual data not provided by BNSF		

It is elementary that in developing actual incremental fuel costs, use of such basic actual T & O inputs as the actual number of locomotives per train, and the actual gross tons per train, will produce better and more accurate incremental cost calculations than use of the system average number of locomotives and gross tons per train. Examples of these differences are contained in Exhibit No. 9 and Exhibit No. 10.

BNSF uses different fuel surcharge formulae for different classes of traffic specifically because they have different fuel consumption and cost characteristics based on their relative operational efficiencies, as discussed in more detail in following sections of this Rebuttal Verified Statement.

4. Our Model Appropriately Estimates Empty Train Weights

Mr. Fisher's claim that we failed to consider empty trains is patently false. As clearly shown in our Exhibit No. 4, our calculated weight for unit train ("UT") shipments is based on the standard practice of averaging the gross weight and tare weight of the shipment. Our calculated weight for single car/multiple car ("SC/MC") shipments, reflects that the local and manifest trains

carrying the SC/MC shipments are of roughly the same weight in both directions (East-West, or North-South).

Mr. Fisher states in footnote 34 that our average train weight considers only the loaded portion of the movement and that the system average for through trains reflects both loaded and empty movements. This statement is misleading. For SC/MC traffic, our calculation is based on the average of the trains that moved the loaded shipment. These trains are generally manifest trains and, as Fisher points out, also include some locals and road switchers. These train types contain both loaded and empty cars in both directions and therefore are congruous with the system average figures to which Fisher refers.

The difference between the two figures (actual and system average) is caused by the fact that the manifest trains (containing both loaded and empty carloads) that move agricultural commodities ("Ag") and other heavy carload traffic (the trains included in the study) are much heavier on average than many of the trains (i.e., intermodal trains) that contribute to the relatively lower system average through train weight. Stated differently, there are no lighter corresponding empty trains to balance the weight of the loaded manifest trains that carry SC/MC Ag traffic. The traffic moves in both directions on trains of similar consist and weight.

From 2006 through 2010, { } carloads³⁰ included in our fuel study were classified as { }. For these { } carloads, { } trains³¹ { }. On average, each

³⁰ { }

³¹ { }

carload moved on { } trains.³² In total, { } of the { } trains reported in the waybill data { }³³

{

}³⁴ {

}³⁵ {

}³⁶

Based on the { } our assumption that the loaded and empty direction train weights for the trains on which SC and MC shipments moved were roughly equivalent is valid.

5. Our Model Reflects Local And Way Train Statistics

Mr. Fisher states that we failed to consider different train types and ignored the way-train component of URCS system-average costs.³⁷ This assertion is incorrect. We include the locomotive counts and gross train weights of *all trains* on which each carload subject to the MBFSC moves in our calculation of actual locomotives and actual gross tons.

At footnote 44, Mr. Fisher quotes from the URCS User Manual as follows: “The separate treatment of train services is necessary because of the substantial difference in both the average

³² { }

³³ {

³⁴ { }

³⁵ {

³⁶ {

³⁷ { }

³⁷ See Fisher Reply Verified Statement, p. 23.

number of locomotives and gross trailing tons per train between way and through train service.” As discussed at length in prior sections of this rebuttal verified statement, we do not use URCS system average locomotive counts or trailing weights in our model. Rather, we use actual locomotive counts and trailing weights for each train in which the issue traffic moved. Our model *explicitly* accounts for “the way train component” for every move, to the extent there is one.

Mr. Fisher also complains that we calculate the simple average rather than the weighted average locomotive count and trailing weight we use in our model. Mr. Fisher claims that we should have developed the weighted average for these statistics based on the mileage for each train. The approach we followed was necessitated by the data provided by BNSF. {

}³⁸

6. Our Model Reflects The Actual I&I Switching Operations For The Studied Shipments

Mr. Fisher criticizes our use of actual Inter- and Intra-train (“I&I”) switching events because it results in applying system average unit costs to actual (not system average) I&I switching event counts. Mr. Fisher claims this is not permissible because it “fails to account properly for BNSF’s switching costs.”³⁹ Mr. Fisher states that because the URCS I&I unit cost is developed based on the average of 200 miles between I&I switches, it must be applied to every move as though every move undergoes I&I switching every 200 miles. If this is not done, Mr. Fisher claims, “a disconnect in the assignment of URCS costs”⁴⁰ is created. Mr. Fisher claims that

³⁸ Notably, Mr. Fisher failed to make any attempt to correct our so called “error”. This is presumably because the { }

³⁹ See Fisher Reply Verified Statement, p. 26.

⁴⁰ Id.

all SC/MC train shipments must be assigned I&I switching costs based on the assumption that all undergo I&I switching every 200 miles.⁴¹

Mr. Fisher notes that the URCS User Manual states: “Miles between I and I Switch – The average distance between intratrain and intertrain switch is 200 miles.”⁴² Mr. Fisher then proclaims that I&I switching costs “must be assigned to specific movements assuming the same frequency”⁴³ because a finding that the actual average mileage between I&I switching events was anything other than 200 miles would require an adjustment to the URCS SEM unit costs. Mr. Fisher’s position is illogical. Using actual mileage between I&I switching events to develop costs for a single movement or a group of movements (as we have done) does not change the *average* mileage between switches for all movements. The average unit cost is developed based on the total number of switching events for all moves and the total switching costs. This does not mean that all movements are switched at the same frequency.

Mr. Fisher theory is flawed because it results in a masking of the true nature of the very different operating characteristics among the non-unit train movements to which the MBFSC is applied. As we discussed in our OVS, {

}⁴⁴

{

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}

One of Cargill’s chief concerns with regard to the application of the assailed tariff item (“ATI”) to all Ag traffic is that this model fails completely to account for the fact that Ag traffic

⁴¹ Id.

⁴² See Fisher Reply Verified Statement, p. 26. quoting the STB’s URCS User Manual.

⁴³ See Fisher Reply Verified Statement, p. 26.

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is not homogenous and that its operating and cost characteristics vary greatly from movement to movement. Mr. Fisher's treatment of the traffic, i.e., assigning system average handling characteristics to all movements, and thereby artificially overstating the fuel cost and consumption characteristics for relatively fuel-efficient grain traffic, serves to mask the fact that the ATI. { }, is unjustly applied to all Ag traffic, including much more efficient multiple car cuts and DET trains. The simple fact is that the traffic group to which the ATI is applied is much more efficient than system average non-unit train traffic.

This concept is supported by Mr. Fisher's explanation for the values included in his Table 9. Mr. Fisher explains that the "significant decrease" in MBFSC related over recovery in 2007 compared to 2006 was attributable to the fact that in 2006 the MBFSC "was applied only to a subset of the intended traffic" and that later in 2007, "the MBFSC was being applied in the way it was originally designed."⁴⁵ In other words, when the MBFSC is applied to Ag traffic, the MBFSC systematically over recovers incremental fuel costs because it is calibrated based on the characteristics of a different, less fuel-efficient traffic group. But the methodology proposed by Mr. Fisher in this proceeding would force every movement to reflect the same operational efficiencies.

B. MR. FISHER'S ALTERNATE METHODOLOGY PRODUCES RESULTS THAT ARE DEMONSTRABLY CONTRADICTIONARY TO FIELD OBSERVATIONS AND {

The analyses presented by Mr. Fisher do not support BNSF's position that the MBFSC only recovers incremental fuel costs. Our critique of Mr. Fisher's alternate methodology is included below under the following topical headings.

⁴⁵ See Fisher Reply Verified Statement, p. 37.

1. Our Model Reflects Real-World Differences In Fuel Consumption Rates Between Trains
2. Application Of Fisher's System Average Costing Approach Results In Identical Per Car-Mile Fuel Efficiency For Unit Coal And Unit Grain Traffic
3. Application Of Fisher's System Average Costing Approach To Single-Car Shipments Does Not Result In The Per-Train LUM Costs Shown In Fisher's Table 4.
4. Combined Effect Of Fisher's Flawed Methodology

**1. Our Model Reflects Real-World
Differences In Fuel Consumption Rates Between Trains**

Mr. Fisher claims that his system average costing approach reflects the "sensible" outcome "that heavier trains are assigned higher fuel costs,"⁴⁶ and that our methodology assigns the same fuel costs to trains of varying size, which creates an inconsistency. Fisher goes on, "it is inconceivable that the significantly heavier trains would have *the same* total locomotive fuel costs as the lighter trains."⁴⁷

Fisher's assertion of inconceivability {

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⁴⁶ See Fisher Reply Verified Statement, p. 19.

⁴⁷ See Fisher Reply Verified Statement, pp. 20- 21, emphasis in original.

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2. Application Of Fisher's System Average Costing Approach Results In Identical Per-Car Mile Fuel Efficiency For Unit Coal And Unit Grain Train Traffic

Mr. Fisher's approach adjusts LUM costs for unit trains based on relationship between the weight of the train being costed and weight of the system average unit train. Mr. Fisher notes that "...when calculating costs for unit trains, the URCS [Phase III] model assigns the LUM-based costs based on the relationship between the weight of the unit train being costed, and the weight of the average unit train..." thereby attacking our costing methodology because we "...did not follow the standard URCS costing approach of multiplying the URCS cost per LUM by the locomotive unit-miles assigned to the shipment."⁴⁹ Mr. Fisher's criticism here highlights his misunderstanding of the concepts underlying the URCS Phase III system average costing procedures.

Mr. Fisher is correct that the URCS Phase III costing approach does adjust the locomotive unit miles for unit train movements to recognize the difference in the trailing weight for the movement being costed and the system average trailing weight. Effectively, URCS Phase III is adjusting the system average number of locomotives to recognize variation in trailing weight between the train being costed and system average unit train trailing weight. While this might be appropriate for a system average analysis, this adjustment is entirely inappropriate for the development of fuel costs in this proceeding because our analysis identifies the actual number of locomotives. In other words, because we identified the *actual* trailing weight and the *actual*

⁴⁹ See Fisher Reply Verified Statement, p.17 (footnote omitted).

number of locomotives for each train, the two factors are in balance. Mr. Fisher's proposed adjustment is only necessary if the actual number of locomotives is not known.

Mr. Fisher's system average approach serves to *eliminate* from consideration all of the efficiency differences observed between unit Ag trains and unit coal trains in the real world. In Table 3 below, we compare four sets of per car-mile estimates for unit coal and unit grain trains.

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Table 3				
Comparison Of The Impact Of Using Actual Characteristic To System Average Characteristics Advocated By Fisher				
Item		Loaded Car-Miles per Gallon		Relative Fuel Efficiency 1/
		Unit Coal	Unit Grain	
		Train	Train	
(1)		(2)	(3)	(4)
1.	{	{	}	{
2.	{	{	}	{
3.	{	{	}	{
4.	{	{	}	{

1/ Column (2) – Column (3)

2/ {BNSF estimate based on BNSF "Profitability System (ABS)" data and model.

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As shown in Table 3 above. {

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demonstration of the relationships shown in Table 3 is included in Exhibit No. 9.

**3. Application Of Fisher's System Average Costing
Approach To Single-Car Shipments Does Not Result
In The Per-Train LUM Costs Shown In Fisher's Table 4**

Mr. Fisher asserts that our "adjustment to the fuel costs allocated by locomotive unit-miles within URCS... over-rides the manner by which URCS locomotive fuel costs are recovered through the locomotive unit-miles that are assigned to a shipment, and it produces counter-intuitive results".⁵² He is wrong on both counts.

As Mr. Fisher acknowledges in several places, the URCS Phase III program is an accounting device that "assigns"⁵³ costs to a shipment based on the average statistics for a certain type of shipment. Mr. Fisher's model makes the same kind of assignment. In other words, the URCS Phase III program (and Fisher's model) does not attempt to capture the actual scale economies that exist in the industry or the actual incremental fuel costs incurred by a shipment. In contrast, our methodology reflects the true economies realized by BNSF in its operations. Our model calculates movement-by-movement incremental fuel costs based on the best available data for each shipment.

Mr. Fisher claims to have developed an analysis "to focus on the impact of the Crowley/Mulholland unit-cost conversion [by] isolat[ing] a subset of carloads with the same number of locomotives (3.0) and group[ing] those records into quartiles based on the average train

⁵⁰ Each \$0.06 per gallon increase in on-highway diesel fuel corresponds to a \$0.01 per car-mile increase in BNSF's fuel surcharge.

⁵¹ Each \$0.04 per gallon increase in on-highway diesel fuel corresponds to a \$0.01 per car-mile increase in BNSF's fuel surcharge.

⁵² See Fisher Reply Verified Statement, p. 16.

⁵³ See Fisher Reply Verified Statement, p. 17.

weight.”⁵⁴ Fisher clarifies that his analysis includes only “single-car and multiple-car shipments for which Messrs. Crowley and Mulholland calculated 3.0 locomotives.”⁵⁵

Mr. Fisher includes Table 4 that purports to show that our model would assign \$8,077 LUM-related locomotive variable costs to each train in the table, and that the trains would be assigned LUM-related costs ranging from \$8,084 to \$21,361 based on “the standard URCS assignment.” Mr. Fisher’s table is misleading and incorrect.

Mr. Fisher’s analysis *starts with the premise that the per-train mile LUM costs for every through train on BNSF’s system are identical*. More specifically, Mr. Fisher’s model assumes that every SC/MC shipment in calendar year 2009 moves in a train that is pulled by {

{ locomotives and has a gross weight of { } tons. Application of Mr. Fisher’s costing approach to single-car shipments results in identical fuel consumption for trains of the same length and weight with different numbers of locomotives. In Mr. Fisher’s model, {

} Exhibit No. 10 demonstrates the problems with Mr. Fisher’s Table 4.

It is important to note here that Mr. Fisher is only addressing the LUM portion of fuel costs and excludes any cost associated with GTM and SEM. The LUM variable costs are those costs that are determined, in URCS, to be a function of the number of locomotives and the miles traveled. Of

⁵⁴ See Fisher Reply Verified Statement, p. 20.

⁵⁵ See Fisher Reply Verified Statement, pp. 20-23. It is important to note that Mr. Fisher’s characterizations of his analysis and of our analysis on which it is purported to be built are false. Mr. Fisher did not include “single-car and multiple-car shipments for which [we] calculated 3.0 locomotives.” Rather, Mr. Fisher rounded our calculations of the average locomotives used to move each shipment to whole numbers. If we calculated 2.901 or 3.100 locomotives from the provided data, Mr. Fisher rounded the number to 3.0 and claimed that we “calculated 3.0 locomotives.” Mr. Fisher made similar rounding adjustments to our actual calculated gross tonnage and horsepower figures. Mr. Fisher’s analysis is not in any way based on our calculation of locomotives, gross tonnage, or horsepower.

course. the costs are the same regardless of train size. The costs that are a function of weight are, according to URCS, assigned to the GTM component.⁵⁶

4. Combined Effect Of Mr. Fisher's Flawed Methodology

Mr. Fisher restates our analysis using his model which ignores actual locomotive counts, gross train weights, and I&I switching adjustments in favor of system average data, and claims that the change in 2006-2010 aggregate incremental fuel costs (and also overpayments) attributable to these adjustments is a negative \$120 million.⁵⁷

C. MR. FISHER'S INCLUSION OF NON-VARIABLE LOCOMOTIVE FUEL COSTS IGNORES THE FUNDAMENTAL QUESTION OF WHETHER FUEL SURCHARGES EXCEED INCREMENTAL FUEL COSTS

Mr. Fisher states that our analysis must be adjusted to include total locomotive fuel costs, not just the variable fuel costs.⁵⁸ Mr. Fisher claims that the fuel costs in our analysis "...do not represent BNSF's total fuel costs associated with the traffic covered by the MBFSC..." because "...the URCS unit costs represent only the variable portion of locomotive fuel expense."⁵⁹ In Mr. Fisher's opinion, the "...fuel surcharge mechanism is intended to recover all fuel costs, and not just the portion of locomotive fuel costs considered variable by URCS..."⁶⁰ Mr. Fisher increases variable costs by the BNSF system-wide fuel variability factors.⁶¹ Mr. Fisher's increasing variable cost to full cost levels mixes the concepts of costing with ratemaking.

Mr. Fisher's mathematical assignment of the fixed portion of fuel costs is misguided and incorrect as it relates to the determination of the incremental fuel costs associated with the MBFSC.

⁵⁶ In URCS, 45% of the aggregate variable running fuel costs are assigned to GTM and 55% are assigned to LUM.

⁵⁷ See Fisher Reply Verified Statement, p. 28.

⁵⁸ See Fisher Reply Verified Statement, pp. 28-31.

⁵⁹ See Fisher, Reply Verified Statement, p.12.

⁶⁰ See Fisher, Reply Verified Statement, p. 28.

⁶¹ See Fisher, Reply Verified Statement, p. 29.

First, Mr. Fisher fails to understand the concept of costs that are variable with traffic. Second, Mr. Fisher assigns fuel costs to the MBFSC that are recovered in the rates paid by the traffic, as opposed to the fuel surcharge. Third, Mr. Fisher fails to address the appropriateness of the arbitrary, and rejected, methodology to assign costs to the subject traffic.

As noted by the Railroad Accounting Principles Board ("RAPB"), variable cost is a "Cost that varies with levels of output within a particular time frame".⁶² RAPB defined Fully Allocated Cost as "Cost that includes both the variable cost of service and the fixed cost...allocable to the service."⁶³ This definition has remained consistent for decades. In Interstate Commerce Commission ("ICC") Docket 34013, Rules to Govern Assembling & Presenting Cost Evidence ("Docket No. 34013"), the ICC defined variable costs as "unit-costs of output which change with changes in the volume of output" and fully distributed (allocated) costs as "Total expenses, including variable costs per-unit of output plus an allocation of fixed costs."⁶⁴

The variability factors in URCS are intended to allocate total fuel costs to the applicable service factor in order to identify the fuel costs associated with the specific volume of output, i.e., the traffic subject to the MBFSC. In other words, the URCS unit costs are designed to calculate the fuel costs associated with each carload or train transported by BNSF. The fuel that is not related to a specific movement is considered part of the fixed costs and recovered by BNSF in the difference between the rate and the cost of providing service. Our fuel surcharge analyses accounted for the variable (incremental) cost portion of the movement costs above the strike price.

BNSF stated that the fuel surcharge is only intended to recover the incremental cost of fuel. Mr. Fisher has turned this concept on its head and modified BNSF's concept so that the traffic

⁶² RAPB, Final Report, Volume 2, September 1, 1987, p. 117.

⁶³ RAPB, Final Report, Volume 2, September 1, 1987, p. 115.

⁶⁴ 337 I.C.C. 298, 428.

subject to the fuel surcharge should cover variable fuel costs associated with the movement *plus* some allocation of the costs that BNSF incurs elsewhere in its operation. The fixed fuel costs are not associated with the Ag and Carload traffic addressed in this proceeding.

Fixed costs are, by definition, incurred by BNSF regardless of the level of output produced. In developing rates, variable costs constitute the rate floor and the market place dictates the ceiling. Any rate that exceeds variable costs provides a contribution to fixed costs and profits. It is this portion of a rate where the fixed fuel costs are recovered. So, if the BNSF's fuel surcharge goal is to recover only the incremental fuel costs above the strike price, then it is the portion of the base rates that exceeds the variable costs where the fixed costs, including the fixed fuel costs are recovered.⁶⁵

The fuel surcharge is represented by BNSF to recover incremental fuel costs associated with moving traffic at different fuel price levels. "Incremental cost is the overall change that a company experiences by producing one additional unit of good."⁶⁶ The correct framework for evaluating incremental fuel cost is an evaluation of the fuel costs that BNSF incurs for a shipment. If an individual shipment does not occur, BNSF still incurs fuel costs associated with other shipments on its system. Some fuel costs are attributable to the movement of individual shipments and some fuel costs are not. Our model measures the fuel costs that are attributable to individual shipments. Because the STB URCS variability factors implicit in the STB URCS unit costs are the best available measure of attributable costs, we employed them in our model. URCS variability factors recognize that all fuel costs do not change with changes in traffic which is what the fuel surcharge is attempting to measure.

⁶⁵ We note that BNSF has been quite successful in recovering its fixed costs. As shown in our Exhibit No. 14, BNSF earned record revenues and profits between 2006 and 2010. Also shown in our Exhibit No. 14, BNSF's revenue per ton-mile on its Ag traffic grew by 6.30% annually (compounded) during this five year period.

⁶⁶ Investopedia.com.

D. MR. FISHER'S INCLUSION OF NON-LOCOMOTIVE FUEL COSTS CONTRADICTS BNSF'S STATEMENTS REGARDING ITS FUEL SURCHARGE PROGRAM DESIGN AND INTENTIONS

BNSF's fuel surcharge formula is intended to recover BNSF's incremental fuel costs above its stated *locomotive fuel* strike-price of \$0.73 per gallon.⁶⁷ There is no corresponding non-locomotive fuel strike-price implicit in BNSF's base rates to which its fuel surcharge formula is pegged. Because there is no stated non-locomotive fuel base price (or implicit cost), there can be no determination of the incremental cost attributable to increases in non-locomotive fuel.

Mr. Fisher states that non-locomotive fuel costs should be included because "In the Ex Parte No. 661 *Rail Fuel Surcharges* proceeding, the STB recognized the importance of accounting for these expenses when it required that carriers report total fuel costs, including non-locomotive fuel expenses in addition to the locomotive fuel expense."⁶⁸ The report to which Mr. Fisher refers includes no data regarding incremental fuel costs, the number of shipments to which the railroad applies fuel surcharges, or the nature of the surcharges applied to the traffic. When the Board adopted the reporting requirements, it noted that reports are "not intended to be a substitute for evidence brought in an individual case."⁶⁹

The STB Ex Parte 661, Sub No.1 reporting requirements arose after MBFSC was implemented. BNSF now seeks to use the reporting requirement to disguise the fact that its MBFSC program recovers more than the incremental *locomotive fuel costs* which it claims it was designed to recover.

⁶⁷ See, e.g., STB Ex Parte No. 661, Rail Fuel Surcharges, "Comments of BNSF Railway Company", October 2, 2006, p. 16.

⁶⁸ See Fisher Reply Verified Statement, p.13.

⁶⁹ Ex Parte No. 661 Sub No. 1, 8-14-11 at 5.

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Mr. Fisher claims that our analysis must be adjusted to include non-locomotive fuel costs, not just locomotive fuel costs reflected in BNSF's Annual Report. Form R-1 reports filed with the STB.⁷⁰ Mr. Fisher cites Mr. Anderson to support his statement that, "it is appropriate for a rail carrier to seek to recover the incremental costs of non-locomotive fuel as well as the incremental costs of locomotive fuel through a fuel-surcharge mechanism."⁷¹ Mr. Fisher justifies this position by noting that STB instructed Class I carriers to "include all fuel used for railroad operations and maintenance, including motor vehicles and power equipment not charged to function 67-locomotive fuels"⁷² in their quarterly fuel cost reports filed with the STB. Mr. Fisher claims that because these monies are reported to STB in quarterly fuel cost reports, "BNSF is entitled to recover such fuel cost under its MBFSC."⁷³ As such, Mr. Fisher has included these costs in his calculation of BNSF fuel consumption.

In developing his calculation, Mr. Fisher used the BNSF non-locomotive fuel data reported to STB from 4Q07, when the reports were first required, through 4Q2010. Because no BNSF data were available for prior periods (before STB reporting was required), Mr. Fisher used 4Q07-3Q08 data to estimate 1Q06-3Q07 non-locomotive fuel expenses.

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⁷⁰ See Fisher Reply Verified Statement, pp. 31-33.

⁷¹ See Fisher Reply Verified Statement, p. 31.

⁷² See Fisher Reply Verified Statement, p. 32.-

⁷³ Id.

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For example, Mr. Fisher states: “it makes no sense for Messrs Crowley and Mulholland to claim that BNSF should have established a step function for its MBFSC based on regression analysis performed in 2011 using historical data that did not exist when BNSF designed the MBFSC. BNSF designed the carload surcharge mechanism in 2005. All of the inputs to the Crowley/Mulholland regression equations were unknown when BNSF designed the MBFSC.”⁷⁵

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⁷⁵ See Fisher Reply Verified Statement p. 46.

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Mr. Fisher expends great effort discounting our analytical framework because it relies on ex post analysis – going so far as to claim that as long as BNSF’s intentions were reasonable in 2005, BNSF should not have been reasonably expected to adjust its surcharge program since that time to reflect market or operational changes.

However, BNSF is eager to take advantage of a STB reporting requirement that became effective nearly two years after the launch of its MBFSC program {

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E. MR. FISHER’S INCLUSION OF NON-LOCOMOTIVE FUEL COSTS CONTRADICTS THE USE OF THE AII-LF INDEX TO ADJUST BASE TRANSPORTATION RATES

The Association of American Railroads (“AAR”) developed the All Inclusive Index Less Fuel (“AII-LF”) to be used to escalate rates to which fuel surcharges are applicable. The AII-LF was developed by removing (backing out) the fuel component of the RCAF index. The fuel component that AAR removed from the RCAF to develop the AII-LF is equal to the locomotive fuel component reported in the railroads’ Annual Report Form R-1 and implicit in the railroads’ URCS unit costs. The fuel component in the RCAF reflects the expenditures shown in Schedule 750 and Schedule 410 of the Annual Report Form R-1. These values, which are the inputs into URCS, do not include non-locomotive fuel. The non-locomotive fuel costs BNSF seeks to recover

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here are implicit in and already recovered through AII-LF rate adjustments. as part of the materials and supplies for the other components in the index. AII-LF was designed explicitly for the purpose of ensuring that the railroads would not double-recover fuel cost increases through a surcharge and a rate increase that factored in fuel cost increases. Allowing BNSF to recover non-locomotive fuel costs via the surcharge would result in a prohibited double-recovery of incremental fuel costs.

**F. MR. FISHER’S HEDGING ADJUSTMENTS RELY
ON FUEL PRICE DATA THAT IS NOT REPORTED
TO THE STB IN EITHER ITS R-1 OR ITS EX PARTE 661 FILINGS**

Mr. Fisher claims that BNSF’s fuel hedging activities should not be reflected in our analysis, and that “pre-hedge fuel prices must be used in the analysis to evaluate whether the fuel surcharge-mechanism is reasonably tracking what it is supposed to track.”⁷⁷ Mr. Fisher states that. “hedging is a financial device designed to mitigate the effects of fuel price volatility.”⁷⁸

Our analysis uses fuel prices as reported in BNSF’s Annual Report Form R-1 and Ex Parte No. 661. Sub No. 1 filings and as incorporated in BNSF’s URCS unit costs. Companies falling under the purview of the Securities and Exchange Commission (“SEC”), including the BNSF, are required under Federal regulations to disclose the accounting policies used to account for derivative financial and commodity instruments, including the methods of applying the policies that materially affect the determination of the results of the business’ operations.⁷⁹ These policies governing derivative financial instruments are established by the Financial Accounting Standards Board (“FASB”) and codified in Accounting Standards Code 815 – *Derivatives and Hedging* (“ASC 815”). ASC 815 constitutes the Generally Accepted Accounting Principles (“GAAP”)

⁷⁷ See Fisher Reply Verified Statement, p. 34.

⁷⁸ See Fisher Reply Verified Statement, p. 33.

⁷⁹ See 17 CFR 210.4-8(n) Accounting policies for certain derivative instruments.

covering hedge and derivative accounting.⁸⁰ The Code of Federal regulations requires at 49 CFR 1200.2 that railroads filing accounting reports with the STB follow GAAP accounting unless specified to do otherwise by the STB. Therefore, the Annual Report, Form R-1 submitted by the BNSF and other Class I railroads must account for hedging activities consistent with ASC 815.

ASC 815 establishes accounting and reporting standards for derivative financial instruments used in hedging activities. Companies that acquire certain derivative financial instruments that meet specific criteria may classify the instruments as cash flow hedges, from which companies may apply specific accounting procedures.⁸¹ Derivative financial instruments that do not qualify for cash flow hedge accounting are accounted for under standard derivative accounting. Under either standard derivative accounting or cash flow hedge accounting, a company must flow the gains or losses on the instrument through its earnings, e.g., bring the results into the company's income or profit/loss statement, at the expiration or sale of the derivative instrument. The specific accounting adjustment to bring the effective impact of the derivatives into a company's income statement must be linked to the asset, liability or forecasted transaction in which it is trying to limit the variability in cash flows.⁸² In other words, the adjustment to the income statement related to the derivative transaction must have some nexus to the reason for acquiring the derivatives in the first place.⁸³

⁸⁰ FASB originally issued ASC 815 as Statement of Financial Accounting Standards No. 133, "Accounting for Derivative Instruments and Hedging Activities" June 1998 ("FAS 133"). To simplify the task of researching an accounting topic, FASB launched its *FASB Accounting Standards Codification* project, which in 2009 codified all relevant accounting pronouncements comprising GAAP.

⁸¹ See ASC 815, Paragraph 28. A company may designate a derivative financial instrument as hedging the exposure to variability in expected future cash flows that is attributable to a particular risk. That exposure may be associated with an existing recognized asset or liability (such as all or certain future interest payments on variable rate debt), or on a forecasted transaction (such as a forecasted purchase or sale.)

⁸² Under cash flow hedge accounting standards, companies test the effectiveness of their hedges to determine if the derivative instrument will effectively hedge all or only part of the expected future volatility. Companies must immediately flow through to their earnings the fair value of the portions of the hedges not deemed effective. Companies can record the ineffective portion of the hedge in the revenue or cost category impacted, e.g., the ineffective portion of the fuel hedge recorded in fuel expenses, or in another duly noted income statement account. BNSF adjusts its fuel expense account for ineffective portions of hedges not requiring effectiveness testing.

⁸³ Such a nexus is necessary as to not allow a company to hide or misrepresent losses to company investors.

As with many transportation companies, BNSF has acquired derivative instruments to hedge against increases in fuel prices. BNSF has entered into transactions with investment grade counterparties based on New York Mercantile Exchange #2 heating oil (“HO”) and West Texas Intermediate Crude (“WTI”) contracts.⁸⁴ BNSF accounts for these instruments using hedge and standard derivative accounting as required by ASC 815.⁸⁵ BNSF recognizes any gains or losses on both its cash flow hedges and other derivative contracts in its earnings by making adjustments to its reported fuel expenses.⁸⁶ This is consistent with ASC 815 as BNSF seeks to reduce the variability in expected future cash flows from changes in diesel fuel prices. The net impact is that BNSF obtains cost certainty around a portion of its fuel expenses by acquiring these derivative financial instruments.

Fisher’s argument that the STB must ignore the cost certainty obtained by the railroad’s fuel hedging activities is both bizarre and illogical. Fisher claims that Cargill should not use the fuel expense BNSF reports in its income statement to calculate the railroad’s fuel costs, even though the fuel expense BNSF reports for accounting purposes is identical to the actual economic cost the railroad bears for fuel. This is because the net cost of fuel to BNSF is based on its hedged fuel costs and not the price of fuel when BNSF purchases it. In establishing BNSF’s economic fuel expense, the price paid before hedging is irrelevant. It is the net cost to BNSF that is the key factor.

Excluding the impact of hedging on fuel costs would create a disconnect between the incremental fuel costs BNSF actually incurs and the fuel costs it recovers through its surcharge program. Companies hedge to counter market uncertainty, but the fuel surcharge program shields

⁸⁴ See BNSF Railway 2010 SEC Form 10-K at page 12. BNSF states that it believes there is a high correlation between diesel fuel, HO and WTI prices, which allows these contracts to hedge BNSF’s fuel costs.

⁸⁵ See BNSF 2010 Annual Report From R-1, Schedule 200, Note 4. Because of its acquisition by Berkshire Hathaway, some costless collar derivatives did not qualify for hedge accounting.

⁸⁶ See BNSF 2010 Annual Report From R-1, Schedule 200, Note 4.

BNSF from the impacts of fuel market uncertainty because it passes BNSF's fuel-related costs onto its customers. BNSF uses its surcharge program to leverage its fuel hedging activity. BNSF seeks to lower its fuel costs through hedging and pass on only part of its fuel cost savings (or losses) to its customers.⁸⁷

BNSF designed the MBFSC to ensure that volatile fuel prices could be passed through to shippers in a transparent and efficient manner. In essence, BNSF is attempting to play the middle by recovering fuel costs it does not incur (due to hedging) through a mechanism it says should not be adjusted to reflect the effect of those hedging activities. If there were no fuel surcharge programs, BNSF would be assuming all the risk associated with its fuel hedging activities. However, because BNSF passes a large portion of its fuel expenses through to its shippers, BNSF's risk level is significantly reduced. BNSF expects to gain all the reward from favorable hedging activities but passes much of the risk associated with a volatile fuel market on to its shippers.

The fuel expenses reported in BNSF's Annual Report Form R-1 and reflected in BNSF's URCS unit cost data include the effects of hedging (both savings and losses). These are the expenses and costs that support all regulatory cost analyses, i. e., the same costs that Mr. Fisher vehemently argues should never be adjusted in any manner. Mr. Fisher now argues that a special adjustment must be used in this proceeding.

Mr. Fisher also complained that our analysis was problematic because our use of actual service units in our calculation of actual fuel costs "creates an inconsistency between the service units and the unit cost, an inconsistency that is avoided by the system average URCS approach that

⁸⁷ Furthermore, Mr. Fisher's adjustment amounts to an adjustment to URCS unit costs which he states is not allowed with respect to other portions of our analysis. Mr. Fisher evidently believes that adjustments to URCS unit costs are only "permissible" when they benefit BNSF.

consistently uses the average train weight and the average unit cost.”⁸⁸ Mr. Fisher is explicitly adjusting the URCS unit costs (which reflects hedging activities as required by STB reporting requirements) to back out the effects of hedging. Mr. Fisher can not have it both ways. His hedging adjustment, by definition, “creates an inconsistency between the service units and the unit cost, an inconsistency that is avoided by the system average URCS approach that consistently uses the average train weight and the average unit cost.” Finally, the hedging adjustment is also excluded from consideration in the development of the AII-LF index, creating a disconnect between Fisher’s calculation and the actual fuel cost recovered through the base rate.

**G. MR. FISHER’S ANALYSIS FAILS TO
RECOGNIZE THE RELATIVE FUEL-EFFICIENCY
OF AG TRAFFIC RELATIVE TO INDUSTRIAL PRODUCTS**

BNSF maintains three separate MBFSC programs, two of which – “Ag” and “Other Carload” – reference the same tariff item. The Ag and Other Carload traffic groups show demonstrably different fuel consumption (and fuel cost) structures. This is largely because much of the Ag traffic moves in efficient shuttle and Destination Efficiency Trains (“DET”).⁸⁹

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⁸⁸ See Fisher Reply Verified Statement, p. 20.

⁸⁹ The STB characterized its Fuel Surcharges decision in *DuPont* as one that was grounded in removing cross-subsidies. (see STB Decision in STB Docket No. 42099 *E.I. DuPont De Nemours and Company v. CSX Transportation, Inc.*, unprinted, 6/2/08, p.11). BNSF is overcharging Ag shippers (including Ag shuttle shippers) by applying a surcharge that is claimed to be calibrated based on the fuel consumption rates of a less efficient group of traffic. Stated differently, in a one-size-fits-all program structure, efficient Ag traffic subsidizes less efficient industrial traffic.

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**1. Treatment Of Ag And Industrial
Traffic As Separate Groups Is Appropriate**

Mr. Fisher claims that we have no basis for segregating the MBFSC into two surcharges.⁹² BNSF implemented the MBFSC in two phases to cover two separate groups of traffic: (1) Ag in January 2006, and (2) Other Carload in April 2007. BNSF maintains two separate programs that both reference the same tariff item. We have used BNSF's definition to segregate the traffic – we did not create it.

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⁹² See Fisher Reply Verified Statement. p. 45.

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2. Mr. Fisher's Claims That Our Traffic Group Segregation Is A Device Created For This Proceeding Is Belied By His "Correction" To Our Definition Of Ag And Other Traffic To Reflect BNSF's Internal Definition

Mr. Fisher asserts that we "erroneously classified many movements to the Other Freight group that are considered Ag traffic in BNSF's marketing organization, mis-categorizing certain STCC 28 and 14 movements."⁹⁵ Though he is technically correct, these inadvertent mis-categorizations have minimal impact on our model or the answer it produces.

We have adjusted our categorization process and we show the minimal impact in Exhibits 11 through 13.⁹⁶ Specifically, the Ag step-function is restated to 5.13 (from 5.18), the Other Freight step-function is restated to 4.70 (from 4.57), { } issue traffic carloads are shifted from "Other Traffic" to "Ag Traffic" and the net result is that BNSF's over-recovery during the study period is restated to \$28,913,677 (from \$29,033,463 in our OVS) or a reduction of \$119,786.⁹⁷

3. Update Of MPG Analysis

We have updated our study to reflect a slightly different segregation of Ag and Other Freight traffic based on the 7-digit, rather than the 2-digit STCC as we had done in our OVS. The MPG figures we calculated in Opening changed very minimally. Specifically, we calculated that during the 2006 through 2010 study period, BNSF actually averaged { } MPG for Ag traffic

⁹⁴ {

}

⁹⁵ See Fisher Reply Verified Statement, footnote 77.

⁹⁶ Exhibit 11 is a summary of the over payments on the issue Cargill traffic (a restatement of our Exhibit 3), Exhibit 12 shows the revised regression analyses which result in a slight change to the step-functions (a restatement of our Exhibit 5), and Exhibit 13 contains a revised fuel surcharge program table based on the Exhibit 12 step-functions (a restatement of our Exhibit 7).

⁹⁷ See: "Fuel And Miles Summary w added calcs v1305 strike Ag rebuttal.xlsx" at level "Summary 0610 2mo".

{ } MPG when surcharge miles are used as the divisor)⁹⁸ and { } MPG for other traffic to which the ATI was applied ({ } MPG when surcharge miles are used as the divisor).⁹⁹ We calculated the revised MPG for Ag unit trains during the 2006 to 2010 study period as { } MPG ({ } MPG when surcharge miles are used as the divisor)¹⁰⁰.

**H. MR. FISHER IGNORES OUR DEMONSTRATION
THAT BNSF SELECTED A STRIKE-PRICE OF \$1.25 PER GALLON
MISREPRESENTS THE RELATIONSHIP BETWEEN HDF AND BNSF FUEL PRICES**

Mr. Fisher states that our determination that BNSF's strike-price starting point "is unreliable and does not provide a basis for a finding that BNSF was required to select a different starting point."¹⁰¹ Mr. Fisher quickly glosses over our opening analyses without attempting to make any demonstration that our analyses were deficient in any way. Mr. Fisher has no real means of showing our analyses to be incorrect.

Mr. Anderson states: "In 2004-2005, we concluded that the \$1.25 strike price roughly corresponded to an internal fuel price of \$0.73 using a regression analysis that looked at BNSF's historical fuel costs and the average historical HDF price. Exhibit 8 at 1 [footnote to BNSF_CARGILL_0307566 at 0307566.]"¹⁰² {

⁹⁸ See electronic work paper "Fuel And Miles Summary w added calcs v1305 strike Ag rebuttal.xlsx", level "MonthAll", range: AK68: AP76.

⁹⁹ {

¹⁰⁰ { }

¹⁰¹ See Fisher Reply Verified Statement, p.3.

¹⁰² See Anderson Reply Verified Statement, p. 15.

} Nor did BNSF develop an analysis in Reply that supports its claims that a \$1.25 HDF price per gallon corresponds to a BNSF fuel price of \$0.73 per gallon.

We evaluated the relationship between HDF and BNSF fuel price for the time period immediately preceding BNSF's development and release of its MBFSC program and found that, based on regression analysis of monthly January 2004 through June 2005 HDF and BNSF fuel price data, the HDF equivalent to a BNSF fuel price of \$0.73 per gallon was \$1.355 per gallon.¹⁰³ In addition, based on regression analysis of quarterly 1Q00 through 2Q05 HDF and BNSF fuel price data, the HDF equivalent to a BNSF fuel price of \$0.73 per gallon was \$1.293 per gallon.¹⁰⁴

In our OVS, we also {

}¹⁰⁵ As we explained in our OVS, our use of \$1.298 per gallon is therefore a conservative estimate of the HDF equivalent to BNSF's \$0.73 per gallon strike-price.

BNSF offers other reasons for its selection of \$1.25 per gallon as its starting point, but none of these reasons relate to BNSF's internal fuel price. For example, Mr. Anderson states that, "we selected \$1.25 HDF as the strike price because {

}"" And further that,

"{

}""¹⁰⁶ {

¹⁰³ See: Rebuttal work paper "Fuel cost compare Rebuttal.xlsx" at level "comparison", cell W16.

¹⁰⁴ See: Rebuttal work paper "Fuel cost compare Rebuttal.xlsx" at level "comparison", cell Z16.

¹⁰⁵ { }

¹⁰⁶ { }

}

Table 4
Comparison Of Changes In BNSF Fuel Price and HDF Fuel Price

<u>Year</u> (1)	<u>BNSF Fuel Price</u> (2)	<u>5-year average</u> (3)	<u>HDF Price</u> (4)	<u>5-year Rolling average</u> (5)	<u>Spread</u> ¹ (6)	<u>5-year Rolling Average Spread in Price</u> ² (7)
1. { }	{ }	{ }	{ }	{ }	{ }	{ }
2. { }	{ }	{ }	{ }	{ }	{ }	{ }
3. { }	{ }	{ }	{ }	{ }	{ }	{ }
4. { }	{ }	{ }	{ }	{ }	{ }	{ }
5. { }	{ }	{ }	{ }	{ }	{ }	{ }
6. { }	{ }	{ }	{ }	{ }	{ }	{ }
7. { }	{ }	{ }	{ }	{ }	{ }	{ }
8. { }	{ }	{ }	{ }	{ }	{ }	{ }
9. { }	{ }	{ }	{ }	{ }	{ }	{ }
¹ Column (4) – Column (2).						
² { }						

{

}¹⁰⁷

Based on data available to BNSF before its MBFSC program was implemented, the assertion that \$1.25 per gallon HDF price is equivalent to the \$0.73 per gallon BNSF strike-price is clearly false. An adjustment needs to be made to recognize the over-recovery in fuel costs due to this inaccuracy.

Mr. Fisher also attacks our assessment of the validity of \$1.25 as the HDF equivalent to BNSF fuel price of \$0.73. We show that historical data indicates the \$1.298 per gallon HDF is the equivalent of \$0.73 per gallon BNSF fuel price. Mr. Fisher claims that the starting point for our restatement (2006-2010 data) renders our analysis meaningless because BNSF did not have access to that data at the time. Mr. Fisher complains that the degree of precision in the number we included “cannot be justified” and that we ourselves “report a number of different values that [we] assert correspond to an internal BNSF price of \$0.73.”¹⁰⁸

Mr. Fisher neglects to address that the other values we “assert correspond to an internal BNSF price of \$0.73” are all greater than \$1.298 per gallon and were all available to BNSF at the time it was selecting its strike-price equivalent. Our OVS made it clear that we chose the \$1.298 per gallon value because it was the lowest value of all the values that could reasonably be argued to correspond to \$0.73 per gallon based on data that was available before or since the ATI was developed and implemented.

Mr. Fisher offered no evidence that \$1.25 per gallon HDF is or was a reasonable equivalent for \$0.73 per gallon BNSF fuel price in his Reply Verified Statement, and stated only that BNSF

¹⁰⁷ {

}

¹⁰⁸ See Fisher Reply Verified Statement, p.53.

was entitled to use any value it so chose. He states, "In their desire to reverse-engineer BNSF's fuel surcharge, the Crowley/Mulholland analysis ignores the obvious fact that BNSF had to choose *some* starting point for the MBFSC. The Board should not second-guess reasonable choices for the starting point of a fuel surcharge."¹⁰⁹ Mr. Fisher further asserts that "BNSF was entitled to make a decision about the starting point based on the data that were available at the time."¹¹⁰

The problem with this position is that it gives the benefit of the doubt to the railroads and essentially shields them from any challenge to the reasonableness of their choices or implementation of those choices. A choice is not reasonable simply because a choice had to be made.

I. MR. FISHER IGNORES OUR DEMONSTRATION THAT A ROUNDING ERROR IS IMPLICIT IN BNSF'S FUEL SURCHARGE FORMULA

Mr. Fisher attacks our ½ step adjustment on the basis that this adjustment means that we must be calling for the "starting point [to] have been established with an excessive focus on precision, at the cost of convenience and transparency."¹¹¹ There is no need to collect a surcharge at the strike price because the cost of fuel up to the strike price is already collected by the line haul rate being charged. From a mechanical standpoint, once the equivalent price is established (through whatever means) and the step function determined, it is a straightforward adjustment that is neither inconvenient nor opaque, as demonstrated in the following example:

1. Assume the correct strike-price equivalent was \$1.25 HDF
2. Assume the correct step function was 1 cent increase per car-mile for each 4 cent increase in HDF.

¹⁰⁹ See Fisher Reply Verified Statement, p. 54.

¹¹⁰ See Fisher Reply Verified Statement, p. 53. -- To demonstrate the ridiculousness of Mr. Fisher's position, following his logic BNSF could have set the strike price at any value it chose and once selected it could not be second-guessed by any outside entity.

¹¹¹ *Id.*

This adjustment simply results in the surcharge being collected starting at \$1.27 rather than \$1.25.¹¹²

Mr. Anderson makes it clear that BNSF chose \$1.25 per gallon HDF as the strike-price equivalent (“The strike-price was set at \$1.25 HDF”), and that BNSF would recover surcharges at the strike price (“At \$1.25 HDF, the fuel surcharge was \$0.01 per mile”).¹¹³ As we explained in our OVS, this is unreasonable because it necessarily means that BNSF collects fuel surcharges when it incurs no incremental fuel costs.

**J. MR. FISHER’S SAFE-HARBOR ARGUMENT ASSUMES
BNSF PAID MORE FOR FUEL THAN IT ACTUALLY
DID AND FAILS TO RECOGNIZE THE DIFFERENCE
BETWEEN A PRICE INDEX AND A SURROGATE PRICE**

BNSF determined that it had over recovered { } in fuel surcharges due in large part to the fact that its fuel surcharge formula step-function (one cent per loaded car-mile surcharge increase for every four cent increase in HDF price) is too steep. However, BNSF takes the position that its step-function is unassailable because it is based on the use of a surrogate price for which the Board granted “Safe Harbor.” We do not dispute that BNSF is justified in using the HDF as the index upon which its surcharge program step function is based (which is what the “Safe-Harbor ruling actually granted). However, we demonstrated in our OVS and supporting work papers that the use of HDF price as a surrogate for BNSF fuel price without accounting for the variable spread between the two commodity prices is unreasonable, and that an adjustment to the step-function is required to account for the variable spread. The extent to which the improperly calibrated step-

¹¹² At \$1.25 per gallon HDF (the strike-price), BNSF incurs no incremental fuel cost. If BNSF’s 4:1 step function is assumed to be correct, BNSF incurs an incremental fuel cost of one cent when the HDF price is \$1.29 per gallon. Therefore, BNSF incurs an incremental fuel cost of one-half cent when the HDF price is \$1.27 per gallon. Fair treatment of the incremental fuel cost would require rounding down below one-half cent of incremental cost and rounding up at or above one-half cent of incremental cost (i.e., HDF = \$1.27 per gallon).

¹¹³ See Anderson Reply Verified Statement, p. 20.

function over recovers incremental fuel costs varies with variations in the surrogate fuel price. This is because the effect of the too-short step length compounds as fuel prices increase. As discussed above, the correct step length for the fuel surcharge formula is 5.13 cents for Ag traffic and 4.70 cents for Other Freight traffic.¹¹⁴

BNSF's calculation of its total incremental fuel costs can be derived by multiplying BNSF's calculation of the gallons it consumed to move the traffic¹¹⁵ by BNSF's actual incremental fuel price per gallon at the time of the movement.¹¹⁶ BNSF calculated that it consumed { } gallons of fuel to move the traffic at a weighted average incremental fuel price of { } per gallon, for a total of { } in total incremental fuel costs.¹¹⁷ When compared to the { } total fuel surcharges¹¹⁸ BNSF collected during the same time period, BNSF shows that it over-recovered \$181 million in fuel surcharges.¹¹⁹

In an attempt to justify this over recovery, BNSF conducted an exercise in which it replaced BNSF's actual incremental fuel costs with the incremental fuel costs BNSF's improperly calibrated formula inferred it should have incurred. BNSF did this by subtracting its assumed strike-price equivalent HDF price of \$1.25 per gallon from the monthly HDF price per gallon for the 2006-2010 time period to calculate an inferred monthly incremental fuel price per gallon. BNSF then calculated a surrogate incremental fuel cost by multiplying BNSF's calculation of the gallons it consumed to move the traffic by this inferred incremental fuel price per gallon at the time of the

¹¹⁴ The step length is 4.94 when considering all traffic together. In our OVS we determined that the correct step length was 5.18 for Ag traffic and 4.57 for Other Freight traffic. In Rebuttal we have reclassified some movements and recalibrated the step length slightly.

¹¹⁵ BNSF's consumption calculation includes fuel volumes it should not include: namely non-variable locomotive fuel and non-locomotive fuel.

¹¹⁶ BNSF's incremental fuel price per gallon is inaccurate because it reflects improper hedging and non-locomotive fuel price adjustments.

¹¹⁷ { }

¹¹⁸ { }

¹¹⁹ { }

movement. BNSF multiplied its estimate of { } gallons of fuel consumed by the inferred incremental fuel price per gallon,¹²⁰ to arrive at a phantom { } in total incremental fuel costs.¹²¹ This phantom incremental cost is completely irrelevant because it does not represent (and significantly overstates) the actual incremental costs BNSF incurred.

BNSF then compared this phantom incremental cost figure to its actual surcharge revenues and concluded that if BNSF had actually incurred this phantom level of costs then BNSF would not have over recovered revenues through its fuel surcharge program. This “demonstration” only serves to underscore the fact that BNSF’s fuel surcharge formula bears no reasonable nexus to BNSF’s incremental fuel costs. Even using BNSF’s flawed incremental cost calculations, BNSF’s surcharge formula is shown to overstate its incremental costs by { }.¹²²

Mr. Fisher states that “the STB created a ‘safe harbor’ for use of HDF prices.” citing *Fuel Surcharges III*.¹²³ Fisher underscores the importance of this point as he notes that our restatement of the BNSF fuel surcharge program factors is based “in large part” on our “focus on the variation over time between BNSF’s internal fuel costs and HDF prices.”¹²⁴ Based on BNSF’s position in this proceeding, BNSF is not only gaming the system, it is openly and brazenly gaming the system. The HDF can be used as an index to estimate relative change in railroad fuel costs but not as a substitute for absolute change in railroad fuel cost.¹²⁵ Mr. Fisher (and Mr. Anderson) readily admit, { }¹²⁶ {

¹²⁰ The weighted average inferred incremental fuel price was \$1.768 per gallon, compared to BNSF’s calculation of its actual incremental fuel price per gallon of \$1.631.

¹²¹ { }

¹²² { }

¹²³ See Fisher Reply Verified Statement, p. 6.

¹²⁴ Id.

¹²⁵ If BNSF’s claim regarding STB’s position on “safe harbor” is correct, then we are to believe that the STB intentionally approved carrier use of fuel surcharges as a profit center, despite its repeated rulings to the contrary..

¹²⁶ { }

} BNSF cannot continue to game the system and hide behind this demonstrably flawed presumption into the future.

In our OVS, we demonstrated that, although an *index* based on *relative changes* in HDF price do fairly represent corresponding *relative changes* in BNSF fuel prices, *absolute changes* in HDF prices do not fairly represent *absolute changes* in BNSF fuel price.¹²⁷

In this proceeding, we are not advocating for use of an index other than HDF price, which is all the “safe harbor” protects. We simply state (and *all* data supports) that the spread between HDF prices and BNSF fuel prices is not constant. BNSF’s treatment of that spread as constant is unreasonable in light of BNSF’s knowledge (for the last 10 years at least) that the spread is not only dynamic, but is steadily increasing to the favor of BNSF. Mr. Fisher hides behind their interpretation of a STB policy that, if it were intended to be treated as BNSF claims, would have produced the obviously unintended consequence that the railroads would be able to extract excess revenues via their fuel surcharge programs due to the fact that the chosen proxy for railroad fuel cost changes misrepresents the actual changes in a manner that favored BNSF in { } of the { } months between January 2006 and December 2010 inclusive ({ } of the time).

Since the program’s inception in January 2006, use of the HDF price as a proxy for BNSF fuel price has resulted in an average overstatement of { } per gallon of BNSF fuel price implicit in the MBFSC formula ({ } per gallon average spread vs. { } per gallon assumed spread).

¹²⁷ See Crowley/Mulholland OVS at Table 4.

1. Mr. Fisher Believes BNSF Is The Only Party That Is Entitled To Review The Relationship Between HDF And BNSF Fuel Prices And That BNSF Is Never Required To Adjust Its Formula Regardless Of The Extent To Which The Relationship Unfairly Disadvantages Shippers

Mr. Fisher claims we ignored the “safe harbor” granted by the STB regarding the use of HDF price as a surrogate for BNSF fuel price.¹²⁸ He says that “it makes no sense” for us to “base [our] critique to a large extent on the fact that HDF price diverged over time from BNSF’s internal fuel cost.”¹²⁹ Fisher’s word choice is telling, because he recognizes that the facts show that HDF diverged from BNSF’s fuel costs.

BNSF openly admits that we are correct in our assessment of the situation but says the truth does not matter.

2. Mr. Fisher Confuses The Fuel Surcharge Formula Step-Function With Fuel Consumption Rates

Mr. Fisher states that the HDF price “is employed in [the ATI] table as a proxy to measure the change in the price BNSF pays for fuel.” and that, “the increase of \$0.01 for every \$0.04 increase in HDF... reflects BNSF’s assumption that the fuel consumed to handle the MBFSC shipments is approximately 4 MPG.”¹³⁰ Fisher goes on to state that “the step function does, as a matter of arithmetic, mean that the MBFSC incorporates a 4 MPG factor. An increase of one cent in the fuel surcharge per mile associated with each four-cent increase in the HDF price per gallon translates to 4 miles per gallon.”¹³¹

Mr. Fisher makes false representations in drawing this incorrect conclusion. Although HDF price is employed in the table as a proxy for the price BNSF pays for fuel, we have demonstrated that absolute change in HDF does not fairly represent absolute change in BNSF fuel price. Use of

¹²⁸ See Fisher Reply Verified Statement, p. 39.

¹²⁹ See Fisher Reply Verified Statement, p. 42.

¹³⁰ See Fisher Reply Verified Statement, p. 7.

¹³¹ See Fisher Reply Verified Statement, p. 8.

the HDF price not only inaccurately measures the change in price BNSF pays for fuel, it also consistently overstates the change in price BNSF pays for fuel. Because we have proven that a measure of the absolute change in HDF misrepresents the absolute change in price BNSF pays for fuel, the arithmetic Fisher refers to is shown to be reliant on a false presumption regarding the value of one of the variables in the equation.

An increase of one cent in the fuel surcharge per mile associated with each four-cent increase in the HDF price per gallon does not translate to 4 miles per gallon because BNSF does not purchase or burn HDF in its locomotives. One additional gallon of HDF can be purchased at price change = X, whereas 1 additional gallon of BNSF fuel can be purchased at price change = $0.924X$.¹³² Therefore, there is a disconnect between BNSF's MPG figure and its MBFSC function, even if BNSF's consumption rate were actually 4 MPG. This is why we correctly call the 1 to 4 fuel surcharge table structure a step function rather than a consumption rate.

It is important to note that we do not object in this proceeding to the use of HDF price as an index for BNSF fuel price. We simply demonstrate that an adjustment to the step-function (not the index) is needed to account for the relationship between HDF and BNSF fuel prices.

Mr. Fisher states that there is "no need" to use regression analysis to determine the step function because the step function is actually a fuel consumption rate and we could have simply calculated fuel consumption rates from our analysis and used that result as a step function.¹³³ Mr. Fisher goes so far as to show that a manipulated version of our analysis produces BNSF fuel consumption rates near 4.0 MPG.¹³⁴ Fisher's Table 11 again ignores the demonstrated disconnect

¹³² See: rebuttal work paper "BNSF unit costs and fsc 2002-2010 v2.xlsx", at level "HDF vs BN Fuel", cell H4.

¹³³ See Fisher Reply Verified Statement, p. 46.

¹³⁴ See Fisher Reply Verified Statement, p. 47, Table 11.

between HDF and BNSF fuel prices. Because the ATI is based on HDF, not BNSF fuel prices, the step function does not reflect the fuel consumption rate.

We developed a step function through regression analysis specifically because of the known disconnect between the step function and consumption rates that is created by the use of IIDF in lieu of actual BNSF fuel prices.

In an apparent attempt to confuse the issue, Mr. Fisher misrepresents our OVS analysis as follows:

The Crowley/Mulholland step-function analysis is based on the contrary [to *Fuel Surcharges*] assumption – namely that it is *not* appropriate to assume that BNSF’s fuel costs change at the same rate as the HDF index and BNSF must account for the differences in its fuel surcharge mechanism.¹³⁵

Mr. Fisher completely misrepresents the detailed analysis and explanation included in our OVS. We agree that HDF and BNSF prices are well-correlated. However, highly correlated values are not necessarily acceptable substitutes. While we have demonstrated that it is appropriate to assume that BNSF’s fuel costs change by the same percentage as the HDF index, our analysis shows that BNSF’s fuel costs do not change *by the same absolute amount as* the IIDF index.

Mr. Fisher often confuses rate of change with absolute change and misrepresents our OVS. Mr. Fisher attempts to restate our explanation of the need for an adjustment to account for the IIDF-BNSF fuel price relationship: “In other words, if one starts with actual MPGs... it is necessary to adjust the MPG estimate upward to account for the fact that BNSF’s actual fuel costs do not change *at exactly the same rate as* the HDF index.”¹³⁶

¹³⁵ See Fisher Reply Verified Statement, p. 48. emphasis in original.

¹³⁶ See Fisher Reply Verified Statement, p. 50. emphasis added.

This is simply not what we said. We said that if one starts with actual MPG's then it is necessary to adjust the MPG estimate upward to account for the fact that BNSF's actual fuel costs do not change *by exactly the same absolute amount as* the IIDF index.

**K. BNSF'S FUEL SURCHARGE DOES NOT RECOVER
INCREMENTAL COSTS ASSOCIATED WITH
LOCOMOTIVE INVESTMENT AND OTHER OPERATING EXPENSES**

Mr. Fisher complains that we "fail[ed] to consider the offsetting impact of [BNSF fuel efficiency] investments to [our] recovery analysis."¹³⁷ According to Mr. Fisher and Mr. Anderson, the costs incurred by BNSF to deliver fuel or obtain any fuel efficiencies should be considered in evaluating the MBFSC program. Following their logic, the "capital expenditures on items such as fuel-efficient locomotives and fueling facilities plus operating expenses such as the costs of tank-car movements of fuel, mechanical laborers, and fueling platforms"¹³⁸ are offsets to any windfall obtained through the MBFSC. Mr. Fisher and Mr. Anderson opine that the recovery analysis should recognize these costs, e.g., the fueling related expenses that equaled { } in 2009 and the locomotive acquisition costs that increased { } between { }¹³⁹ For the reasons outlined below, the locomotive investment costs and fueling related expenses plus the resulting efficiencies realized by BNSF are unrelated to the determination of the reasonableness of BNSF's MBFSC.

First, Mr. Fisher and Mr. Anderson have redefined the purpose of the MBFSC. BNSF has consistently held that the only purpose of the MBFSC is to recover incremental fuel costs, i.e., the increased cost of purchasing the fuel above a strike price. Now, Mr. Fisher and Mr. Anderson find no fault with the over recovery of fuel surcharge payments because that over recovery would offset

¹³⁷ See Fisher Reply Verified Statement, p. 38.

¹³⁸ See Fisher Reply Verified Statement, p. 38 and Anderson Reply Verified Statement, page 30.

¹³⁹ { }

other costs that BNSF has incurred. Mr. Fisher and Mr. Anderson also believe that the benefits associated with any cost reductions should accrue to the BNSF. This proceeding is an unreasonable practice complaint where the sole consideration is whether or not the revenues obtained by BNSF through the MBFSC equal the incremental fuel costs incurred by BNSF.

Second, Mr. Fisher states these monies are not included as fuel expenses in BNSF's Annual Report Form R-1.¹⁴⁰ These costs are not part of the fuel component of the RCAF or the AILF and are recovered elsewhere in every rate adjustment mechanism. Stated differently, to suggest that these non-fuel costs are somehow an incremental fuel cost that should be recovered through the MBFSC is incorrect because indexes such as the AILF already adjusted for the increases in the non-fuel costs.

Third, the BNSF purchases more efficient locomotives for more reasons than the fuel consumption of these new locomotives. Newer locomotives provide increased horsepower which results in fewer units per train, greater reliability and less maintenance cost. Mr. Fisher does not address these efficiencies or how they should be included in the calculation of the MBFSC.

Fourth, Mr. Fisher's claim that over recovery of fuel surcharge revenues should consider the { } in increased locomotive acquisition costs is irrelevant for several reasons. As shown above, the acquisition costs are not part of the incremental fuel costs BNSF states it is attempting to recover. BNSF revenues per locomotive unit-mile have increased 31 percent over the same time period.¹⁴¹ In other words, revenues are increasing at a pace that provides more than sufficient recovery of the locomotive acquisition costs.

¹⁴⁰ See Fisher Reply Verified Statement, p. 38.

¹⁴¹ Based on BNSF's R-1 data, revenue per locomotive unit-mile equaled 2.53 cents per LUM in 2006 and 3.31 cents per LUM in 2010 (Schedule 210, Line 1 revenues divided by Schedule 755, Line 14 LUM).

**L. MR. FISHER’S CLASSIFICATION OF REGULATED
AND EXEMPT COMMODITIES CONTAINS TWO ERRORS**

Mr. Fisher claims that our statement of overpayments that Cargill made to BNSF between April 19, 2008 and December 31, 2010 includes shipments of commodities that are exempt from STB regulation. Mr. Fisher’s determination of exempt commodities contains two errors. Specifically, he classified two non-exempt commodities¹⁴² as exempt in his classification exercise. Using the analysis we developed to assess the impact of reclassifying certain STCC 14 and 28 shipments as Ag traffic as a basis, we determined the impact of excluding shipments of exempt commodities from our overpayments analysis on the assumption that Mr. Fisher’s assertion is correct. As shown in our work papers, if the subject shipments are excluded, the resulting overpayments are \$26,794,305 on { } carloads shipped between April 19, 2008 and December 31, 2010.¹⁴³

**M. MR. FISHER’S CLASSIFICATION OF TRAFFIC
AS BEING PAID BY CARGILL IS BASED ON { }**

Mr. Fisher claims that our statement of overpayments that Cargill made to BNSF between April 19, 2008 and December 31, 2010 includes shipments for which Cargill was not the freight payer. { }

¹⁴² STCC 26613 and STCC 3295215. See: “Commodity Exemptions Rebuttal.xlsx” at level “Fisher Check”.

¹⁴³ { }

Mr. Fisher claims that we should have classified shipments as Cargill shipments only if the ultimate customer field indicated that Cargill was the ultimate customer. Because BNSF {

}

III. BNSF'S FAILURE TO CORRECTLY DESIGN OR ADJUST ITS FUEL SURCHARGE PROGRAM FORMULA REVEALS BNSF'S INTENTIONS TO USE THE FUEL SURCHARGE PROGRAM AS A PROFIT CENTER

In this section of our rebuttal verified statement, we demonstrate that the design of BNSF's fuel surcharge program resulted in a profit center for BNSF. Our discussion below is summarized under the following topical headings:

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B. BNSF's Over-Recovery Is Due To Design Flaws In BNSF's Formula

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Mr. Fisher states that BNSF's decision to use a fuel consumption rate of 4 MPG to develop its step-function was "well-supported by the data BNSF had available at the time." and that "is also

confirmed by an after the fact analysis of fuel costs and miles.”¹⁴⁴ {

} ¹⁴⁵

{

}

**B. BNSF’S OVER-RECOVERY IS DUE
TO DESIGN FLAWS IN BNSF’S FORMULA**

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}

Mr. Anderson states:

We also knew that from year to year (or quarter to quarter) actual fuel consumption and the MPG estimates derived from such consumption will

¹⁴⁴ See Fisher Reply Verified Statement, p. 6.

¹⁴⁵ {

}

vary somewhat based on the volume of traffic and the mix of traffic in the period at issue. {

}¹⁴⁶

{

}¹⁴⁷ {

}

**2. BNSF's Formula Incorporates A Price Index
That Creates A Disconnect Between
The Step-Function And BNSF Fuel Consumption Rates**

Mr. Fisher incorrectly states that we developed “the same MBFSC with alternative MPG and strike-price values developed through a series of regressions.”¹⁴⁸ We did not develop alternative MPG values. As noted above, use of HDF as a price index necessarily means that the MBFSC program is not a consumption-based formula. We developed alternative *step lengths* that recognize the disconnect between HDF price and BNSF price.

¹⁴⁶ See Anderson Reply Verified Statement, p. 9.

¹⁴⁷ { }

¹⁴⁸ See Fisher Reply Verified Statement, p. 9.

3. BNSF Recognized That Much Of Its Over Recovery Of Incremental Fuel Costs Was Attributable To The Increasing Spread Between HDF And BNSF Fuel Prices

Mr. Fisher states that after making all of the adjustments to our model, including use of system average rather than actual operating statistics, including non-variable locomotive fuel costs, including non-locomotive fuel costs, adjusting for BNSF hedging activities, and improperly grouping Ag and other carload freight together, “the corrected results still show... a { } overall recovery percentage for the five-year analysis period.”¹⁴⁹ But that, “the entire amount of apparent recovery over 100% [{ }] is eliminated when the variations between HDF prices and BNSF’s internal fuel costs are accounted for.”¹⁵⁰

Rather than address the causes for this massive discrepancy between incremental fuel costs and MBFSC revenues, BNSF openly admits that it will simply hide the balance behind the variations between HDF prices and BNSF’s incremental fuel costs. It is important to note that BNSF does not dispute that the over recovery is real, but rather that it has found a way to “eliminate” the over recovery from its analysis. BNSF does this by “accounting for” the fact that its chosen price index clearly misrepresents the changes in its internal fuel prices.

4. BNSF Failed To Correct For This Known Design Flaw When It Re-Based Its Strike Price To \$2.50 HDF Effective In 2011

Mr. Fisher pontificates on the issue of whether { } over recovery that his analysis shows “provides any basis for concern over the fundamental design of the MBFSC.”¹⁵¹ He concludes that it was “impossible” for BNSF to predict how the surcharge would have performed

¹⁴⁹ See Fisher Reply Verified Statement, pp. 35-36.

¹⁵⁰ See Fisher Reply Verified Statement, p. 36.

¹⁵¹ See Fisher Reply Verified Statement, pp.36-38 .

due to a “myriad [of] dynamic elements” and “constant fluctuations in traffic levels,” “most of which are outside the control of the railroad” that affect operations and costs.¹⁵²

However, even using BNSF’s cost assumptions that favor BNSF, and ignoring {

} BNSF had all the data it needed at its

disposal to see that it had over recovered (by its own calculation) {

} respectively.

In fact, not only did BNSF fail to make an adjustment to reflect the known divergence between HDF and BNSF fuel prices, but BNSF’s strike-price rebasing actually serves to do two things: (1) it obscures the impact of the use of a biased index; and (2) it ensures that BNSF will lock-in the windfall resulting from the use of that biased index in perpetuity.

**5. BNSF’s “Revenue-Neutral” Re-Basing
Practice Served To Lock-In The Over-Recovery
Attributable To The Spread Between HDF And BNSF Fuel Prices**

{

} ¹⁵³

{

} ¹⁵⁴

¹⁵² See Fisher Reply Verified Statement, p. 36.

¹⁵³ {

¹⁵⁴ {

}

{

}

In January 2011, the MBFSC rate was \$0.48 per loaded car-mile based on the published November 2010 HDF price of \$3.140 per gallon.¹⁵⁵ This implies that BNSF's fuel cost per gallon in November 2010 was \$2.620 per gallon (\$3.140-\$0.52).¹⁵⁶ BNSF's actual November 2010 fuel price was \$2.409, or a spread of \$0.731 per gallon (\$3.140-\$2.409).¹⁵⁷ Based on statistical analysis, a reasonable estimate of BNSF fuel price based on an HDF value of \$3.140 would be \$2.432 (spread = \$0.708), as we demonstrated in our OVS evidence.¹⁵⁸

Assume that under the \$1.25 HDF-based MBFSC, BNSF recovered \$1.00 per loaded car-mile through the base rates and \$0.48 through the MBFSC when the MBFSC was rebased in January 2011. The rebasing from \$1.25 to \$2.50 would result in a per-mile surcharge of \$0.17¹⁵⁹, a surcharge reduction of \$0.31 per loaded car-mile.¹⁶⁰

{

¹⁵⁵ See rebuttal work paper "BNSF unit costs and fsc 2002-2010 v2.xlsx" at level "FSC", range C109:1109.

¹⁵⁶ HDF price of \$3.14 less the assumed HDF-BNSF fuel price spread of \$0.52 (\$1.25 HDF - \$0.73 Strike-price)

¹⁵⁷ See rebuttal work paper "BNSF unit costs and fsc 2002-2010 v2.xlsx" at level "HDF vs BN Fuel", range C62:E62.

¹⁵⁸ As shown at rebuttal work paper "BNSF unit costs and fsc 2002-2010 v2.xlsx" at level "HDF vs BN Fuel", cell G22, the statistical relationship between HDF and BNSF fuel price for the 2006-2010 time period can be stated as follows: BNSF Fuel = 0.9239 x HDF -0.4694. 0.9239 x \$3.140 - \$0.4694 = \$2.432

¹⁵⁹ \$3.140 - \$2.499 / 4 (rounded up) - \$0.17 cents per loaded car-mile.

¹⁶⁰ \$0.48 - \$0.17.

}¹⁶¹ {

}

{

}¹⁶² {

}

Table 5 below shows the impact of BNSF's rebasing exercise on fuel surcharge over-recovery.

¹⁶¹ {

}

¹⁶² {

}.

Table 5
Impact Of BNSF's Rebasing Exercise On Fuel Surcharge Over-Recovery

<u>Item</u> (1)	<u>Source</u> (2)	<u>Pre-Rebasing</u> (3)	<u>Post-Rebasing</u> (4)
1. { }	{ }	{ }	{ }
2. { }	1/ { }	{ }	{ }
3. { }	{ }	{ }	{ }
4. { }	1/ { }	{ }	{ }
5. { }	{ }	{ }	{ }
6. { }	{ }	{ }	{ }
7. { }	{ }	{ }	{ }
8. { }	{ }	{ }	{ }
9. { }	{ }	{ }	{ }
10. { }	{ }	{ }	{ }
11. { }	{ }	{ }	{ }
1/ { }			

{

}¹⁶³ {

}¹⁶⁴

¹⁶³ { }
¹⁶⁴ {

}

{

}

Mr. Fisher states that the alternate fuel surcharge formula factors (HDF equivalent and step function) that we developed could not have been selected by BNSF because they are derived from data that was not available to BSNF when the program was designed.¹⁶⁵ Our analysis is not meant to simply demonstrate that BNSF's formula did not yield an exact match. Rather, it shows that BNSF's formula resulted in a severe mismatch that was beneficial to BNSF. {

}¹⁶⁶ {

}¹⁶⁷

¹⁶⁵ See Fisher Reply Verified Statement, pp. 2-3.

¹⁶⁶ {
¹⁶⁷ {

}
}

two years is that... the MBFSC was applied only to [Ag] traffic in 2006, with the balance of the traffic being included in April 2007.”¹⁶⁹

Mr. Fisher’s statement confirms two things: 1) Ag traffic and carload traffic have different fuel cost characteristics and should be subject to different MBFSC formulae; and 2) the ATI systematically over recovers incremental fuel costs on Ag traffic. It would have been a straightforward exercise for BNSF to adjust the step function it developed in consideration of all Ag and carload traffic to reflect the more efficient Ag subset before the program was implemented.

IV. CONCLUSIONS

BNSF’s fuel surcharge program over-recovers the incremental fuel costs BNSF claims it was designed to recover. During the 2006-2010 study time period, BNSF over-recovered \$560.9 million in fuel surcharge revenues for the traffic provided by BNSF.

In Reply, BNSF agreed with our calculation of fuel surcharge revenue for the studied traffic but claimed that our calculation of incremental fuel costs was understated. After each of BNSF’s four cost adjustments was quantified, BNSF’s evidence demonstrates that the over-recovery in fuel surcharge revenues equaled { } for the studied traffic.

We demonstrated that each of BNSF’s adjustments is not justified, mis-calculated and/or provides no support for BNSF’s claimed position that its fuel surcharge mechanisms are intended to only recover incremental fuel costs. BNSF’s URCS costing adjustments are not credible because BNSF replaces actual movement data inputs with system average data inputs which creates a disconnect between BNSF’s operations and its incremental cost calculations. BNSF’s non-variable locomotive fuel adjustment is not credible because it converts BNSF’s incremental costs to total costs. BNSF’s non-locomotive fuel is recovered through adjustments to the base rate. BNSF’s

¹⁶⁹ See Fisher Reply Verified Statement, p. 37.

hedging adjustment is not credible because the net cost of fuel to BNSF is based on its hedged fuel costs and not the price of fuel when BNSF purchases it.

The reasons the BNSF fuel surcharge formula over recovers incremental fuel costs is that the formula step-function (one cent per loaded car-mile surcharge increase for every four cent increase in HDF price) is too steep, and the formula starting point (HDF = \$1.25 per gallon) is too low. Simply stated, because of its design flaws, the surcharge formula produces revenues that bear no reasonable nexus to the fuel costs it incurs.

BNSF agrees that its step-function is too steep. However, BNSF takes the position that its step-function is unassailable because it is based on the use of a surrogate price for which the Board granted "Safe Harbor." We do not dispute that BNSF is justified in using the HDF as the index upon which its surcharge program step function is based (which is what the "Safe-Harbor" ruling actually granted). However, we demonstrate that the use of HDF price as a surrogate for BNSF fuel price without accounting for the variable spread between the two commodity prices is unreasonable, and that an adjustment to the step-function is required to account for the variable spread.

In an attempt to justify this { } over recovery, BNSF conducted an exercise in which it replaced BNSF's actual incremental fuel costs with the incremental fuel costs BNSF inferred it should have incurred. BNSF then compared this phantom incremental fuel cost figure to its actual surcharge revenues and concluded that if BNSF had actually incurred this level of costs then BNSF would not have over recovered revenues through its fuel surcharge program. This 'demonstration' only serves to underscore the fact that BNSF's fuel surcharge formula bears no reasonable nexus to BNSF's incremental fuel costs.

EXHIBIT NO. 8
REDACTED

EXHIBIT NO. 9
REDACTED

EXHIBIT NO. 10
REDACTED

EXHIBIT NO. 11
REDACTED

EXHIBIT NO. 12
REDACTED

Restated BNSF Mileage-based Fuel Surcharge Tables

Restated Air Traffic Surcharge Table

Strike Price	\$1.298						
Step	0.0513						
HDF value	Step	Surcharge					
From	To	Length	per Loaded				
			Car mile				
\$0.000	\$1.297	xxx	\$0.00				
\$1.298	\$1.323	0.0257	\$0.00 1/				
\$1.324	\$1.374	0.0513	\$0.01 2/				
\$1.375	\$1.425	0.0513	\$0.02				
\$1.426	\$1.477	0.0513	\$0.03				
\$1.478	\$1.528	0.0513	\$0.04				
\$1.529	\$1.579	0.0513	\$0.05				
\$1.580	\$1.631	0.0513	\$0.06				
\$1.632	\$1.682	0.0513	\$0.07				
\$1.683	\$1.733	0.0513	\$0.08				
\$1.734	\$1.785	0.0513	\$0.09				
\$1.786	\$1.836	0.0513	\$0.10				
\$1.837	\$1.887	0.0513	\$0.11				
\$1.888	\$1.939	0.0513	\$0.12				
\$1.940	\$1.990	0.0513	\$0.13				
\$1.991	\$2.042	0.0513	\$0.14				
\$2.043	\$2.094	0.0513	\$0.15				
\$2.094	\$2.144	0.0513	\$0.16				
\$2.145	\$2.196	0.0513	\$0.17				
\$2.197	\$2.247	0.0513	\$0.18				
\$2.248	\$2.298	0.0513	\$0.19				
\$2.299	\$2.350	0.0513	\$0.20				
\$2.351	\$2.401	0.0513	\$0.21				
\$2.402	\$2.452	0.0513	\$0.22				
\$2.453	\$2.504	0.0513	\$0.23				
\$2.505	\$2.555	0.0513	\$0.24				
\$2.556	\$2.606	0.0513	\$0.25				
\$2.607	\$2.658	0.0513	\$0.26				
\$2.659	\$2.709	0.0513	\$0.27				
\$2.710	\$2.760	0.0513	\$0.28				
\$2.761	\$2.812	0.0513	\$0.29				
\$2.813	\$2.864	0.0513	\$0.30				
\$2.864	\$2.914	0.0513	\$0.31				
\$2.915	\$2.966	0.0513	\$0.32				
\$2.967	\$3.017	0.0513	\$0.33				
\$3.018	\$3.068	0.0513	\$0.34				
\$3.069	\$3.120	0.0513	\$0.35				
\$3.121	\$3.171	0.0513	\$0.36				
\$3.172	\$3.223	0.0513	\$0.37				
\$3.224	\$3.274	0.0513	\$0.38				
\$3.275	\$3.325	0.0513	\$0.39				
\$3.326	\$3.377	0.0513	\$0.40				
\$3.378	\$3.428	0.0513	\$0.41				
\$3.429	\$3.479	0.0513	\$0.42				
\$3.480	\$3.531	0.0513	\$0.43				
\$3.532	\$3.582	0.0513	\$0.44				
\$3.583	\$3.633	0.0513	\$0.45				
\$3.634	\$3.685	0.0513	\$0.46				
\$3.686	\$3.736	0.0513	\$0.47				
\$3.737	\$3.787	0.0513	\$0.48				
\$3.788	\$3.839	0.0513	\$0.49				
\$3.840	\$3.890	0.0513	\$0.50				
\$3.891	\$3.941	0.0513	\$0.51				
\$3.942	\$3.993	0.0513	\$0.52				
\$3.994	\$4.044	0.0513	\$0.53				
\$4.045	\$4.095	0.0513	\$0.54				
\$4.096	\$4.147	0.0513	\$0.55				
\$4.148	\$4.198	0.0513	\$0.56				
\$4.199	\$4.249	0.0513	\$0.57				
\$4.250	\$4.301	0.0513	\$0.58				
\$4.302	\$4.352	0.0513	\$0.59				
\$4.353	\$4.403	0.0513	\$0.60				
\$4.404	\$4.455	0.0513	\$0.61				
\$4.456	\$4.506	0.0513	\$0.62				
\$4.507	\$4.558	0.0513	\$0.63				
\$4.559	\$4.609	0.0513	\$0.64				
\$4.610	\$4.660	0.0513	\$0.65				
\$4.661	\$4.712	0.0513	\$0.66				
\$4.713	\$4.763	0.0513	\$0.67				
\$4.764	\$4.814	0.0513	\$0.68				
\$4.815	\$4.866	0.0513	\$0.69				
\$4.867	\$4.917	0.0513	\$0.70				
\$4.918	\$4.968	0.0513	\$0.71				
\$4.969	\$5.020	0.0513	\$0.72				

Restated Other Freight Surcharge Table

Strike Price	\$1.298						
Step	0.0470						
HDF value	Step	Surcharge					
From	To	Length	per Loaded				
			Car mile				
\$0.000	\$1.297	xxx	\$0.00				
\$1.298	\$1.320	0.0235	\$0.00 1/				
\$1.321	\$1.367	0.0470	\$0.01 2/				
\$1.368	\$1.414	0.0470	\$0.02				
\$1.415	\$1.461	0.0470	\$0.03				
\$1.462	\$1.508	0.0470	\$0.04				
\$1.509	\$1.555	0.0470	\$0.05				
\$1.556	\$1.602	0.0470	\$0.06				
\$1.603	\$1.649	0.0470	\$0.07				
\$1.650	\$1.696	0.0470	\$0.08				
\$1.697	\$1.743	0.0470	\$0.09				
\$1.744	\$1.790	0.0470	\$0.10				
\$1.791	\$1.837	0.0470	\$0.11				
\$1.838	\$1.884	0.0470	\$0.12				
\$1.885	\$1.931	0.0470	\$0.13				
\$1.932	\$1.978	0.0470	\$0.14				
\$1.979	\$2.025	0.0470	\$0.15				
\$2.026	\$2.072	0.0470	\$0.16				
\$2.073	\$2.119	0.0470	\$0.17				
\$2.120	\$2.166	0.0470	\$0.18				
\$2.167	\$2.213	0.0470	\$0.19				
\$2.214	\$2.260	0.0470	\$0.20				
\$2.261	\$2.307	0.0470	\$0.21				
\$2.308	\$2.354	0.0470	\$0.22				
\$2.355	\$2.400	0.0470	\$0.23				
\$2.401	\$2.447	0.0470	\$0.24				
\$2.448	\$2.494	0.0470	\$0.25				
\$2.495	\$2.541	0.0470	\$0.26				
\$2.542	\$2.588	0.0470	\$0.27				
\$2.589	\$2.635	0.0470	\$0.28				
\$2.636	\$2.682	0.0470	\$0.29				
\$2.683	\$2.729	0.0470	\$0.30				
\$2.730	\$2.776	0.0470	\$0.31				
\$2.777	\$2.823	0.0470	\$0.32				
\$2.824	\$2.870	0.0470	\$0.33				
\$2.871	\$2.917	0.0470	\$0.34				
\$2.918	\$2.964	0.0470	\$0.35				
\$2.965	\$3.011	0.0470	\$0.36				
\$3.012	\$3.058	0.0470	\$0.37				
\$3.059	\$3.105	0.0470	\$0.38				
\$3.106	\$3.152	0.0470	\$0.39				
\$3.153	\$3.199	0.0470	\$0.40				
\$3.200	\$3.246	0.0470	\$0.41				
\$3.247	\$3.293	0.0470	\$0.42				
\$3.294	\$3.340	0.0470	\$0.43				
\$3.341	\$3.387	0.0470	\$0.44				
\$3.388	\$3.434	0.0470	\$0.45				
\$3.435	\$3.480	0.0470	\$0.46				
\$3.481	\$3.527	0.0470	\$0.47				
\$3.528	\$3.574	0.0470	\$0.48				
\$3.575	\$3.621	0.0470	\$0.49				
\$3.622	\$3.668	0.0470	\$0.50				
\$3.669	\$3.715	0.0470	\$0.51				
\$3.716	\$3.762	0.0470	\$0.52				
\$3.763	\$3.809	0.0470	\$0.53				
\$3.810	\$3.856	0.0470	\$0.54				
\$3.857	\$3.903	0.0470	\$0.55				
\$3.904	\$3.950	0.0470	\$0.56				
\$3.951	\$3.997	0.0470	\$0.57				
\$3.998	\$4.044	0.0470	\$0.58				
\$4.045	\$4.091	0.0470	\$0.59				
\$4.092	\$4.138	0.0470	\$0.60				
\$4.139	\$4.185	0.0470	\$0.61				
\$4.186	\$4.232	0.0470	\$0.62				
\$4.233	\$4.279	0.0470	\$0.63				
\$4.280	\$4.326	0.0470	\$0.64				
\$4.327	\$4.373	0.0470	\$0.65				
\$4.374	\$4.420	0.0470	\$0.66				
\$4.421	\$4.467	0.0470	\$0.67				
\$4.468	\$4.514	0.0470	\$0.68				
\$4.515	\$4.561	0.0470	\$0.69				
\$4.562	\$4.607	0.0470	\$0.70				
\$4.608	\$4.654	0.0470	\$0.71				
\$4.655	\$4.701	0.0470	\$0.72				

Surcharge will increase by \$0.01 per car mile for every 5.13 cent increase in HDF.
 1/ At the strike price, BNSF incurs no incremental fuel cost above the costs recovered through its base rates.
 2/ At the strike price plus half-step HDF price level, BNSF incurs incremental fuel cost equal to half-a-cent per loaded car-mile above the costs recovered through its base rates.

BNSF Revenues And Profits - - 2006 to 2010

During the 2006 to 2010 time period, BNSF reported both record revenues and profits. The increases were led by record BNSF revenues:

1. The years 2006 through 2010 were the highest revenue years in the railroad's history;
2. BNSF reported record revenues in three consecutive years as revenues increased from \$14.9 billion in 2006 to \$18.0 billion in 2008¹;
3. According to BNSF's 2008 Annual Investors' Report "For the full year 2008, BNSF achieved operating revenues of \$18 billion, a 14-percent increase over 2007, which include revenue increases in each of the Company's four business groups";² and
4. While BNSF realized revenue declines in 2009 due to a drop in traffic associated with the U.S. recession, BNSF realized a large increase in revenues in 2010 which was reported its second highest revenues in company history with reported revenues jumping to \$16.9 billion.³

BNSF's record revenues also led to record earnings as BNSF reported its largest net income in company history over the 5 year period:

1. In 2006, BNSF's net income jump 23 percent, as earnings equaled a then record \$1.9 billion⁴;
2. BNSF surpassed its 2006 record profit in 2008 as it reported net income of \$2.1 billion⁵; and
3. While 2009 earnings declined from the prior year record levels due to the recessionary decline in traffic, record earnings were back in 2010 as the newly acquired BNSF reported net income of \$2.5 billion on a combined basis.⁶

¹ See BNSF Annual 2008 Investors' Report at page 3.

² See BNSF Annual 2008 Investors' Report at page 2.

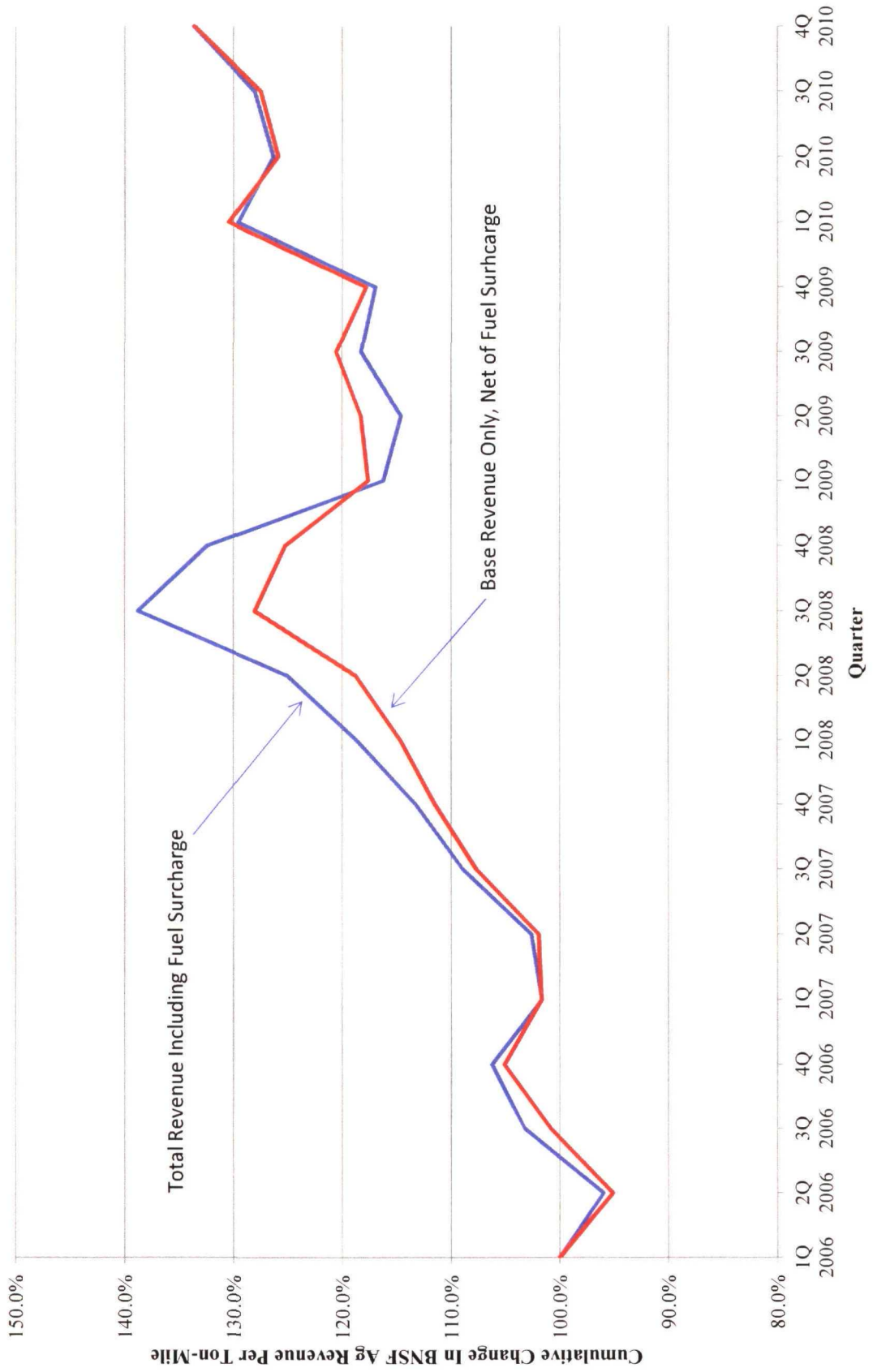
³ See BNSF LLC 2010 SEC Form 10-K. The revenue figures reflect combined pre- and post-acquisition revenues.

⁴ See BNSF Annual 2006 Investors' Report at page 4.

⁵ See BNSF Annual 2008 Investors' Report at page 3.

⁶ See BNSF LLC 2010 SEC Form 10-K. Net income reflect combined pre- and post-acquisition earnings as reported on a combined basis..

**Cummulative Change In BNSF Railway
Agricultural Revenue Per Ton-Mile -- 1Q 2006 to 4Q 2010**
(1Q 2006 = 100.0%)



**BNSF Agricultural Revenues, Ton-Miles,
And Revenue Per Ton-Mile -- 1Q 2006 to 4Q 2010**

Quarter (1)	BNSF Agricultural Revenues (millions) 1/ (2)	BNSF Agricultural Revenue Ton-Miles (millions) 1/ (3)	BNSF Average Agricultural Revenue Per Ton-Mile (mills/ton-mile) 2/ (4)	Cumulative Change In BNSF Agricultural Revenue Per Ton-Mile 3/ (5)	BNSF Average Agricultural Fuel Surcharge Revenue Per Ton-Mile (mills/ton-mile) 4/ (6)	BNSF Average Agricultural Base Revenue Per Ton-Mile (mills/ton-mile) 5/ (7)	Cumulative Change In BNSF Agricultural Base Revenue Per Ton-Mile 6/ (8)
1 1Q 2006	597	27,836	21.4	100.0%	{ }	{ }	{ }
2 2Q 2006	562	27,309	20.6	96.0%	{ }	{ }	{ }
3 3Q 2006	622	28,100	22.1	103.2%	{ }	{ }	{ }
4 4Q 2006	646	28,348	22.8	106.3%	{ }	{ }	{ }
5 1Q 2007	626	28,721	21.8	101.6%	{ }	{ }	{ }
6 2Q 2007	610	27,715	22.0	102.6%	{ }	{ }	{ }
7 3Q 2007	682	29,191	23.4	108.9%	{ }	{ }	{ }
8 4Q 2007	804	33,101	24.3	113.3%	{ }	{ }	{ }
9 1Q 2008	866	34,023	25.5	118.7%	{ }	{ }	{ }
10 2Q 2008	828	30,873	26.8	125.1%	{ }	{ }	{ }
11 3Q 2008	909	30,540	29.8	138.8%	{ }	{ }	{ }
12 4Q 2008	838	29,509	28.4	132.4%	{ }	{ }	{ }
13 1Q 2009	679	27,242	24.9	116.2%	{ }	{ }	{ }
14 2Q 2009	618	25,144	24.6	114.6%	{ }	{ }	{ }
15 3Q 2009	715	28,191	25.4	118.3%	{ }	{ }	{ }
16 4Q 2009	822	32,761	25.1	117.0%	{ }	{ }	{ }
17 1Q 2010	888	31,952	27.8	129.6%	{ }	{ }	{ }
18 2Q 2010	782	28,861	27.1	126.3%	{ }	{ }	{ }
19 3Q 2010	862	31,380	27.5	128.1%	{ }	{ }	{ }
20 4Q 2010	961	33,529	28.7	133.6%	{ }	{ }	{ }
21 2006 Average			21.7		{ }	{ }	
22 2010 Average			27.8		{ }	{ }	
23 2006-2010 Compound Annual Growth Rate			6.30%		{ }	{ }	

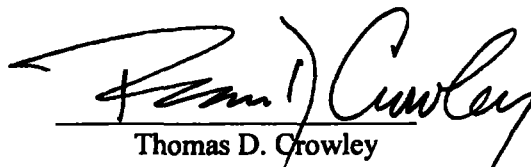
1/ Sources: BNSF Annual 2006 Investors' Report, BNSF Annual 2007 Investors' Report, BNSF 2008 Annual Investors' Report, BNSF SLC Form 8-K dated January 31, 2010, BNSF SLC Form 10-Q for Quarter Ending March 31, 2010, BNSF SLC Form 10-Q for Quarter Ending June 30, 2010, BNSF SLC Form 10-Q for Quarter Ending September 30, 2010 and BNSF SEC Form 10-K for Year Ending December 31, 2010
2/ [Column (3) ÷ Column (2)] × 1,000
3/ Current quarter Column (4) ÷ Line 1, Column (4)
4/ { }
5/ Column (4) - Column (6)
6/ Current quarter Column (7) ÷ Line 1, Column (7)
7/ BNSF no longer publicly reports commodity revenue ton-mile figures 1Q to 4Q 2010 ton-mile estimates based upon historic relationship between BNSF agricultural carloads, BNSF agricultural ton-miles, and the Productivity Adjustment Factor for the Rail Cost Adjustment Factor

EXHIBIT NO. 15
REDACTED

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing
Rebuttal Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that
the same are true and correct. Further, I certify that I am qualified and authorized to file this
statement.


Thomas D. Crowley

Sworn to and subscribed
before me this 23rd day of November, 2011


Helen Mary Lunsford
Notary Public for the State of Virginia

My Commission Expires: November 30, 2015
Registration Number: 7507963


VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, ROBERT D. MULHOLLAND, verify under penalty of perjury that I have read the foregoing Verified Statement of Robert D. Mulholland, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.


Robert D. Mulholland

Sworn to and subscribed
before me this 23rd day of November, 2011


Diane R. Kavounis
Notary Public for the State of Virginia

My Commission Expires: November 30, 2012
Registration Number: 7160645